Supreme Court, U.S.
FILED
MAY 21 1991
OFFICE OF THE CLERK

No. 90-1802

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
and NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
GEORGE R. RAGSDALE
CRAIG G. DALTON, JR.
LEBOEUF, LAMB, LEIBY & MACRAE
Post Office Box 31507
Raleigh, North Carolina 27622
(919) 787-5200

MARGARET M. RICHARDSON
Counsel of Record
FRANCIS M. GREGORY, JR.
W. MARK SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100
Counsel for Petitioners

May 22, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether insurance agents acting in a traditional independent contractor capacity are "employees" for purposes of the Employee Retirement Income Security Act of 1974, as amended?

LIST OF PARTIES PURSUANT TO RULE 29.1

The following statement is provided pursuant to Rule 29.1 of the United States Supreme Court Rules, which requires that this brief include a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners.

Petitioners are members of a group of corporations that includes commonly owned or managed stock and mutual insurance companies, mutual funds, and other companies. Ownership interests in these companies outside the corporate group are limited to the interests of mutual insurance policyholders and mutual fund stockholders. The following list sets forth the Petitioners, parent companies of the Petitioners, and mutual insurance companies and mutual funds affiliated with the Petitioners.

Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company
Nationwide Life Insurance Company
Nationwide General Insurance Company
Nationwide Property and Casualty Insurance Company
Employers Insurance of Wausau A Mutual Co.
Wausau Country Mutual Insurance Company
NGC County Mutual Insurance Company
Farmland Mutual Insurance Company
NIF/Nationwide Money Market Fund
NIF/Nationwide Bond Fund
Nationwide Investing Foundation Fund
Nationwide Investing Foundation Growth Fund
Nationwide Corporation

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES PURSUANT TO RULE 29.1	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	3
JURISDICTION	3
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

	Page
Bartels v. Birmingham, 332 U.S. 126 (1947)	7
Community for Creative Non-Violence v. Reid, 490 U.S. 730, (1989)	9
Darden v. Nationwide Mutual Insurance Co., No. 83-96-CIV-3 (E.D.N.C. May 23, 1985), *vacated and remanded*, 796 F.2d 701 (4th Cir. 1986), *on remand*, 717 F. Supp. 388 (E.D.N.C. 1989), *aff'd*, 922 F.2d 203 (4th Cir. 1991)	*passim*
Democratic Union Organizing Committee v. NLRB, 603 F.2d 862 (D.C. Cir. 1978)	9
Enochs v. Williams Packing and Navigation Co., 370 U.S. 1 (1962)	7
Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990)	11
Harlow v. Nationwide Mutual Insurance Co., No. N-84-503 (D. Conn. June 19, 1987)	12
Holt v. Winpisinger, 811 F.2d 1532 (D.C. Cir. 1987)	8, 9
Kelley v. Southern Pacific Co., 419 U.S. 318 (1974)	9
Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985)	11
Mayeske v. International Association of Fire Fighters, 905 F.2d 1548 (D.C. Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 347 (1990)	9
Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980)	11
NRLB v. Hearst Publications, 322 U.S. 111 (1944)	5, 7, 8
NLRB v. United Insurance Co., 390 U.S. 254 (1968)	8, 9
Penn v. Howe-Baker Engineers, Inc., 898 F.2d 1096 (5th Cir. 1990)	8, 11
Plazzo v. Nationwide Mutual Insurance Co., No. 88-4016 slip op. (6th Cir., Dec. 22, 1989), *cert. denied*, No. 89-1499 (Oct. 29, 1990)	7, 12
Schwartz v. Gordon, 761 F.2d 864 (2d Cir. 1985)	11
Sciara v. Nationwide Insurance Companies, No. 87-2815-4A (W.D. Tenn. March 30, 1990)	12

TABLE OF AUTHORITIES—Continued

	Page
Sica v. Equitable Life Assurance Society, 756 F. Supp. 539 (S.D. Fla. 1990)	11
U.S. v. Silk, 331 U.S. 704 (1947)	5, 7
Wolcott v. Nationwide Mutual Insurance Co., 884 F.2d 245 (6th Cir. 1989)	8, 12

STATUTES

Employee Retirement Income Security Act § 3(2), 29 U.S.C. § 1002(2) (1988)	5, 11
Employee Retirement Income Security Act § 3(6), 29 U.S.C. § 1002(6) (1988)	3, 7
Employee Retirement Income Security Act § 203, 29 U.S.C. § 1053 (1988)	2, 5
Employee Retirement Income Security Act § 3002(c), 29 U.S.C. § 1202(c) (1988)	8
Internal Revenue Code § 3121(d)(3)	9
28 U.S.C. § 1254(1) (1988)	3

REGULATIONS

26 C.F.R. § 31.3121(d)-1(c)(1)	8

CONGRESSIONAL HEARINGS AND REPORTS

Hearings on Private Pension Plans before the Subcommittee on Fiscal Policy of the Joint Economic Committee, 89th Cong., 2d Sess. (April-May 1966)	10
Hearings on H.R. 1045, H.R. 1046 and H.R. 16462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st and 2d Sess. (December 1969, February-May 1970)	10
Hearings on H.R. 1269 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. (April 1971)	10
Hearings on H.R. 2 and H.R. 462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 93d Cong., 1st Sess. (Feb.-April, June 1973)	10

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 127, 93d Cong., 1st Sess. (1973)	11
S. Rep. No. 383, 93d Cong., 1st Sess. (1973)	11
H. Rep. No. 533, 93d Cong., 1st Sess. (1973)	11
H. Rep. No. 779, 93d Cong., 2d Sess. (1974)	11
H. Rep. No. 807, 93d Cong., 2d Sess. (1974)	11
H. Rep. No. 1280, 93d Cong., 2d Sess. (1974)	11
S. Rep. No. 1090, 93d Cong., 2d Sess. (1974)	11

OTHER AUTHORITIES

Brief for the United States as *Amicus Curiae* on Petition for Certiorari, *Plazzo v. Nationwide Mutual Insurance Co.*, No. 89-1499 (Sept. 1990) .. 7, 9-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ——

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioners Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company and Nationwide Life Insurance Company (collectively, "Nationwide")[1] hereby petition that a Writ of Certiorari issue to

---

[1] Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners is included at page (ii) of this petition.

review the judgment of the United States Court of Appeals for the Fourth Circuit, which is in direct conflict with three other courts of appeals on an important question of federal law.

This case presents the question whether insurance agents, and other persons, acting in a traditional independent contractor capacity are "employees" for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Nationwide provides an incentive compensation arrangement to certain of its insurance agents, including plaintiff Robert T. Darden ("Darden"). That contractual arrangement includes a term imposing a financial penalty (loss of future payments) in the event a former agent engages in limited competitive activities. Darden sued under ERISA section 1132(a)(1)(B), alleging that the nonforfeiture requirements of ERISA (29 U.S.C. § 1053(a)) prevented enforcement of that provision against him. Nationwide believes that ERISA does not apply to this arrangement because Darden was not an "employee" of Nationwide within the meaning of ERISA, which is a predicate to application of the statute. The United States Court of Appeals for the Fourth Circuit announced an unprecedented and expansive standard of "employee" status under ERISA that looks to the existence of a retirement plan, the worker's reliance on that plan, and the worker's bargaining power with respect to that plan. That test conflicts with the common-law agency principles properly applied to determine "employee" status under ERISA by the Fifth, Sixth and D.C. Circuits. Nationwide believes, and the Solicitor General of the United States has concurred, that this issue warrants this Court's review. Accordingly, this Court should grant the Petition for Writ of Certiorari.

OPINIONS BELOW

The initial unreported decision of the United States District Court for the Eastern District of North Carolina in this matter was issued on May 23, 1985, and is reprinted in the Appendix (hereinafter cited as "App.") at 47a. The decision of the Fourth Circuit vacating and remanding that initial decision is reprinted in the Appendix at 32a and reported at 796 F.2d 701 (1986) ("*Darden I*"). The order of the Fourth Circuit denying rehearing with respect to *Darden I* is reprinted in the Appendix at 53a. The decision of the District Court on remand is reprinted in the Appendix at 13a and reported at 717 F. Supp. 388 (1989). The second opinion of the Fourth Circuit, dated January 7, 1991, is reprinted in the Appendix at 1a and reported at 922 F.2d 203 ("*Darden II*"). The order of the Fourth Circuit denying rehearing with respect to *Darden II* is reprinted in the Appendix at 51a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254-(1) (1988). The decision of the Fourth Circuit in *Darden II* was issued on January 7, 1991. Petitioners timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc on January 18, 1991, which was denied on February 22, 1991.

STATUTE INVOLVED

Section 3(6) of Title I of ERISA, 29 U.S.C. § 1002(6) (1988), provides: "The term 'employee' means any individual employed by an employer."

STATEMENT OF THE CASE

Nationwide is one of the largest insurance groups in the United States. It underwrites risks through a sales force of independent contractor agents. The relationship

between Nationwide and the agent is governed by an Agent's Agreement. The Agreement specifies that the agent is to act in the capacity of an independent contractor. App. 39a, 49a.

Since 1969, the Agent's Agreement has provided a form of agent compensation presently referred to as the Agent Security Compensation Plan ("ASCP"). The ASCP was designed to provide an incentive to agents to increase Nationwide policy sales, and is conditionally payable after termination of the agency with Nationwide. The Agent's Agreement expressly provides that ASCP payments will not be made if a former agent engages in the insurance business, in competition with Nationwide, within one year of the cancellation of his contract with Nationwide and within a twenty-five mile radius of his Nationwide business location, or in certain other circumstances. App. 3a.

In 1960, Darden became an independent contractor agent for Nationwide and continued in that capacity until 1980. Nationwide's relationship with Darden was governed by eight successive Agent's Agreements, and Darden operated his insurance agency as an independent business. He selected the customers and types of Nationwide insurance he focused on selling. He selected and owned the building and equipment he used in his business. Darden hired and compensated his own staff. He received compensation from Nationwide solely in the form of commissions, which he reported to the Internal Revenue Service as income from self-employment. App. at 39a-40a, 48a-49a. In short, Darden was wholly responsible for the operation of his insurance agency and for his economic success or failure.

In 1980, Nationwide properly exercised its right to terminate Darden's agency contract. One month later Darden reopened his insurance business at the same location he had previously used as a Nationwide agent. He

immediately began representing Nationwide's competitors. Nationwide notified Darden that, by the terms of the Agent's Agreement, no ASCP compensation would be paid to him. App. 3a-4a. Darden brought an action in federal district court alleging that ERISA precluded the enforcement of the conditions for ASCP payments against him and seeking those payments and other relief.

There is no dispute that Darden violated the relevant terms of the Agent's Agreement. The parties disagree whether ERISA is applicable to that Agreement. Darden contends that the minimum vesting requirement of section 203 of Title I of ERISA, 29 U.S.C. § 1053 (1988), applies and does not permit enforcement of the ASCP conditions. That vesting requirement is applicable by its terms only to "employee pension benefit plans," which in turn are limited by statutory definition to specified arrangements for "employees." *See* ERISA § 3(2), 29 U.S.C. § 1002(2) (1988). Nationwide contends that Darden was not its "employee."

In its initial decision, the District Court held on summary judgment that ERISA was inapplicable because Darden was not Nationwide's "employee," applying common-law agency principles. *See Darden v. Nationwide Mutual Insurance Co.*, No. 83-96-CIV-3 (E.D.N.C. May 23, 1985). In *Darden I*, a panel of the Fourth Circuit agreed that Darden most probably was Nationwide's independent contractor at common law. However, the court concluded that "the common-law test for the relationship of master and servant is not the appropriate standard for application" under ERISA. App. 40a. Citing *United States v. Silk*, 331 U.S. 704 (1947) (defining "employee" for purposes of the Social Security Act) and *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (defining "employee" for purposes of the National Labor Relations Act), the panel argued that it should disregard common law and develop an "employee" definition from the stated

purposes of ERISA. The panel then announced a novel, three-part test for ERISA "employee" status, which may be stated as follows:

(1) Whether the "employer" took some action that created a reasonable expectation on the "employee's" part that retirement benefits would be paid in the future;

(2) Whether the "employee" relied on that expectation by remaining for "long years," or a substantial period of time, in the "employer's" service and by foregoing other significant means of providing for retirement; and

(3) Whether the "employee" lacked sufficient bargaining power to obtain contractual rights to nonforfeitable retirement benefits. App. 41a-42a.

The Fourth Circuit remanded the case to the District Court. The principal issue on remand was whether Darden satisfied the second, or "reliance," element of the *Darden I* test. The evidence showed that in 1980, Darden had accumulated (primarily through his insurance business) approximately $450,000 in personal assets and retirement programs, disregarding the ASCP. These assets, together with his ongoing insurance business, were sufficient to secure his financial future. App. 18a-20a. Because only a fraction of these assets were in formal retirement arrangements, however, the District Court held that Darden met the reliance element of the *Darden I* standard and was Nationwide's "employee" for ERISA purposes. App. 23a. For other reasons, the court held that a portion of the ASCP payments were not subject to ERISA. Accordingly, the District Court entered judgment in part for Nationwide and in part for Darden.

Cross appeals were taken. In *Darden II* the Fourth Circuit affirmed the District Court's decision, specifically relying on the *Darden I* standard to determine "employee" status. App. 5a-8a.

REASONS FOR GRANTING THE WRIT

The standard for "employee" status is fundamental to the scope of ERISA. The Fourth Circuit has conceived a standard that sharply conflicts with the standard applied in the other circuits. As with other federal statutes that have raised similar issues and engendered conflicting interpretations, this important federal question merits resolution by this Court. The Solicitor General of the United States has concurred that the ERISA "employee" issue warrants this Court's review, as discussed more fully at pages 9-10, *infra*.[2]

The Fourth Circuit predicated its *Darden* standard not on the language, legislative history or administrative interpretation of section 3(6) of ERISA, but on this Court's decisions in *Silk* and *Hearst*, *supra*. This Court in *Silk* and its companion case, *Bartels v. Birmingham*, 332 U.S. 126 (1947), held that "employee" should be defined for Social Security Act purposes by common-law principles realistically applied. *See Silk*, 331 U.S. at 713-716; *Bartels*, 332 U.S. at 130.[3] The *Darden I* opinion

---

[2] Earlier this Term this Court denied a petition for certiorari raising the issue of the standard for determining "employee" status under ERISA. *Plazzo v. Nationwide Ins. Co.*, No. 89-1499 (Oct. 29, 1990). In *Plazzo v. Nationwide Mutual Ins. Co.*, No. 88-4016 (6th Cir. Dec. 22, 1989), the Sixth Circuit held that a former Nationwide agent was not an ERISA "employee," applying common-law agency principles. App. 54a-58a. As discussed at pages 9-10 *infra*, the Solicitor General filed an *amicus* brief with this Court in *Plazzo* supporting the granting of the petition and adoption of common-law agency principles under ERISA. Because *Darden II* was then pending, it was uncertain whether the Fourth Circuit would apply its *Darden I* standard in a manner conflicting in result with the standard adopted in the other circuits. *Darden II* confirms a conflict among the circuits ripe for this Court's review.

[3] *See also Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1, 3 (1962), noting that the Social Security provisions, as amended subsequent to *Silk* and *Bartels*, "specifically adopt the common-law test for ascertaining the existence of the employer-employee relationship."

rejects common-law principles under ERISA. In *Hearst*, this Court did define "employee" under the NLRA primarily by reference to "the history, terms and purposes of the legislation" (322 U.S. at 124). However, Congress subsequently repudiated that approach and reinstated common-law agency principles under that statute as well. *See, e.g., NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968).

The three courts of appeals that have considered the ERISA "employee" issue since *Darden I* have applied common-law agency principles. *See Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1101-1102 (5th Cir. 1990); *Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245, 250-251 (6th Cir. 1989) (involving the same Nationwide Agency Agreement); *Holt v. Winpisinger*, 811 F.2d 1532, 1538 & n.44 (D.C. Cir. 1987). The Fifth and Sixth Circuits expressly rejected the *Darden* test.

These three circuits concluded "[t]he absence of a comprehensive definition of 'employee' in ERISA and other features of that legislation" indicate that Congress intended common-law principles to apply. *Holt*, 811 F.2d at 1538 n.44. They correctly reasoned that, under the statutory provisions for coordinating the tax and labor law titles of ERISA, tax regulations govern the ERISA nonforfeiture requirement at issue in this case.[4] Those regulations adopt the common-law test of "employee" status.[5] The *Darden* decisions neglect those regulations

[4] Section 3002(c) of ERISA, 29 U.S.C. § 1202(c) (1988), provides in relevant part that regulations prescribed by the Secretary of the Treasury under the Internal Revenue Code vesting requirements shall also apply to the counterpart vesting requirements of Title I of ERISA, and forbids the Secretary of Labor from adopting inconsistent regulations.

[5] The tax nonforfeiture rules follow the FICA "employee" definition, which provides that "[e]very individual is an employee if under the usual common-law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee." 26 C.F.R. § 31.3121(d)-1(c)(1). Congress

altogether. As further evidence of Congressional intent, the *Holt* court also observed that the federal labor laws generally define "employee" status by reference to common-law agency principles.[6]

Further, in *Mayeske v. International Association of Fire Fighters*, 905 F.2d 1548, 1553-1555 (D.C. Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 347 (1990), the D.C. Circuit confirmed its use of common-law agency principles under ERISA in light of this Court's decision in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (adopting common-law principles to define "employee" for purposes of "work made for hire" provisions of Copyright Act of 1976). In that case, this Court concluded that "when Congress has used the term 'employee' without defining it, . . . Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* at 739-740.[7]

The *Darden* standard is also contrary to the United States government's interpretation of ERISA. In an

has added that the term embraces certain others, including "a full-time life insurance salesman" (Internal Revenue Code § 3121(d)-(3)(B)). Thus, Congress recognized that insurance agents are usually not employees under the common-law rules. Moreover, Congress made clear that it did not intend its extension of the definition of "employee" in FICA to cover persons like Darden even if they sold only life insurance, since it further provided that life insurance salesmen are not employees for purposes of FICA if (like Darden) they have "a substantial investment in facilities used in connection with the performance" of their services. Internal Revenue Code § 3121(d)(3).

[6] *See, e.g., NLRB v. United Ins. Co., supra*, 390 U.S. at 256 (NLRA); *Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (noting that the National Labor Relations Board has adopted the common-law test).

[7] For cases applying common-law principles under the Federal Employers Liability Act, see, *e.g., Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974), and the cases cited therein.

amicus curiae brief filed at the invitation of this Court with respect to the petition for writ of certiorari in *Plazzo*, the United States concurred that common-law agency principles, applied with an awareness of the purposes of ERISA, are the proper standard for determining ERISA "employee" status. The United States emphasized the interpretation of "employee" adopted by the agencies that administer ERISA and the need for coordination of the applicable tax and ERISA definitions on this issue. The United States also expressed concern that the *Darden* test was weighted toward a finding that *any* participant in a benefit arrangement was an "employee." Applying ERISA to "any retailer who works continuously and exclusively with another company—including, for example, the owners of many automobile dealerships" stretches the definition of "employee" beyond its limits, in the view of the United States. *Amicus* Brief at 13. Nonetheless, the results in any particular case are prospectively unpredictable under *Darden* because they depend on *each individual's actual reliance* on the expected payments. The United States further found that agency principles better serve the legislative policies underlying the vesting provisions of ERISA, which are limited to employees and do not extend to independent contractors running their own business.

More generally, the concerns reported to and evinced by Congress during its extensive hearings[8] and reports[9] preceding the enactment of ERISA in 1974 related to traditional private pensions for employees at common law or covered by collective bargaining agreements. *See generally Schwartz v. Gordon*, 761 F.2d 864, 868 (2d Cir. 1985). Nothing in the text of this "comprehensive and reticulated statute"[10] indicates that Congress intended any other meaning. Of course, Congress might have extended the coverage of ERISA to all persons eligible to participate in plans providing benefits of the sort listed in section 3(2) of ERISA, 29 U.S.C. § 1002(2). Congress instead chose to limit coverage to plans providing retirement benefits to "employees." In contrast, the *Darden* test "encompasses virtually any individual" participating in an ERISA-covered plan. *Sica v. Equitable Life Assurance Society*, 756 F. Supp. 539, 542 (S.D. Fla. 1990) (rejecting the *Darden* standard and adopting agency principles for ERISA purposes).

One of the stated purposes of ERISA is to provide uniform law governing benefits arrangements of businesses operating in a number of jurisdictions. *See, e.g., Penn*, 898 F.2d at 1102 n.6. Through its expansive "employee" standard, the Fourth Circuit has undermined the otherwise uniform understanding of ERISA. Thus, in each de-

---

[8] *E.g.*, Hearings on Private Pension Plans before the Subcommittee on Fiscal Policy of the Joint Economic Committee, 89th Cong., 2d Sess. (April-May 1966); Hearings on H.R. 1045, H.R. 1046 and H.R. 16462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st and 2d Sess. (December 1969, February-May 1970); Hearings on H.R. 1269 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. (April 1971); Hearings on H.R. 2 and H.R. 462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 93d Cong., 1st Sess. (Feb.-April, June 1973).

[9] *E.g.*, S. Rep. No. 127, 93d Cong., 1st Sess. (1973); S. Rep. No. 383, 93d Cong., 1st Sess. (1973); H. Rep. No. 533, 93d Cong., 1st Sess. (1973); H. Rep. No. 779, 93d Cong., 2d Sess. (1974); H. Rep. No. 807, 93d Cong., 2d Sess. (1974); H. Rep. No. 1280, 93d Cong., 2d Sess. (1974) (conference report); S. Rep. No. 1090, 93d Cong., 2d Sess. (1974) (conference report).

[10] *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). This Court has consistently declined to modify judicially the legislative judgments embedded in the statutory scheme of ERISA. *See, e.g., Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990) (declining to approve an exception for employee malfeasance or criminal misconduct to the unqualified ERISA prohibition on the assignment or alienation of benefits); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (declining to expand ERISA statutory remedies for improper or untimely processing of benefit claims to include extra-contractual damages).

cision outside the Fourth Circuit involving a former Nationwide agent, the agent has been held not to be Nationwide's "employee" for ERISA purposes.[11] The application of an inconsistent legal standard within the Fourth Circuit will adversely affect the ability of Nationwide (as well as the numerous other businesses that utilize independent contractors as sales agents or in other capacities) to operate and maintain any arrangement for its agents that might be thought to be an ERISA plan. Such a result is neither contemplated nor warranted under ERISA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Of Counsel:
GEORGE R. RAGSDALE
CRAIG G. DALTON, JR.
LEBOEUF, LAMB, LEIBY & MACRAE
Post Office Box 31507
Raleigh, North Carolina 27622
(919) 787-5200

MARGARET M. RICHARDSON
Counsel of Record
FRANCIS M. GREGORY, JR.
W. MARK SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100
Counsel for Petitioners

May 22, 1991

---

[11] *See, e.g., Wolcott, supra; Plazzo, supra.* The same conclusion was reached in unpublished District Court decisions in the Second and Sixth Circuits. *See Sciara v. Nationwide Ins. Companies,* No. 87-2815-4A (W.D. Tenn. March 30, 1990) (reprinted in App. at 59a); *Harlow v. Nationwide Mutual Ins. Co.,* No. N-84-503 (JAC) (D. Conn. June 19, 1987) (Cabranes, J., bench ruling) (reprinted in App. at 68a).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2759

ROBERT T. DARDEN,
Plaintiff-Appellee,

versus

NATIONWIDE MUTUAL INSURANCE COMPANY;
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY;
NATIONWIDE LIFE INSURANCE COMPANY,
Defendants-Appellants.

No. 89-2760

ROBERT T. DARDEN,
Plaintiff-Appellant,

versus

NATIONWIDE MUTUAL INSURANCE COMPANY;
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY;
NATIONWIDE LIFE INSURANCE COMPANY,
Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Fayetteville
Terrence W. Boyle, District Judge
(CA-83-96-3-CIV)

Argued: April 3, 1990 Decided: January 7, 1991

Before HALL, MURNAGHAN, and SPROUSE, Circuit Judges.

Affirmed by published opinion. Judge Sprouse wrote the opinion, in which Judge Hall and Judge Murnaghan joined.

ARGUED: George Robinson Ragsdale, LEBOEUF, LAMB, LEIBY & MACRAE, Raleigh, North Carolina, for Appellants. Marion G. Follin, III, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES, HARKAVY & LAWRENCE, Greensboro, North Carolina, for Appellee. ON BRIEF: Craig G. Dalton, Jr., LEBOEUF, LAMB, LEIBY & MACRAE, Raleigh, North Carolina; Margaret M. Richardson, W. Mark Smith, SUTHERLAND, ASBILL & BRENNAN, Washington, D.C., for Appellants.

SPROUSE, Circuit Judge:

Robert T. Darden, a former insurance agent for Nationwide Mutual Insurance Company (Nationwide), sued Nationwide for payments under the latter's post-employment compensation plan—Agent Security Compensation Plan (the ASCP). Nationwide had refused to pay Darden ASCP benefits after his termination because he had violated his agreement "not to compete" with Nationwide, but Darden contends that the Employee Retirement Income Security Act (ERISA) governs his contract and that the vesting requirements of ERISA prevent enforcement of the ASCP forfeiture provisions against him. The district court held that Darden was an "employee" for purposes of ERISA, but that only part of the ASCP qualified under the ERISA definition of a pension plan. It held Darden could recover that portion of the ASCP. Nationwide appeals and Darden cross-appeals. We affirm.

I.

This case has been in litigation for seven years and we have it now for the second time. The facts were fully related in our first opinion, *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701 (4th Cir. 1986) ("*Darden I*"), and need only be summarized here. Darden worked for Nationwide from September 1960 until November 1980. Darden's contract with Nationwide provided for his participation in a retirement and deferred compensation plan for insurance agents—the ASCP. The ASCP has two components—a Deferred Compensation Incentive Credit Plan and an Extended Earnings Plan. The Deferred Compensation Plan was funded as an agent retirement plan by Nationwide's annual contributions based on an agent's earnings from original and renewal fees for insurance policies. Under the Extended Earnings Plan, Nationwide agreed to pay agents upon their retirement, termination, death or disability, a sum equal to their earnings from renewal fees over the prior twelve months.

The agency agreement, however, provided that Nationwide's obligation to pay benefits under the ASCP would terminate if an agent engaged in certain insurance businesses, in competition with Nationwide, within one year of the cancellation of the agent's agreement with Nationwide and within a twenty-five mile radius of the agent's former business location. Nationwide's obligation would also cease if the agent, at anytime after the cancellation of his agency agreement with Nationwide, induced a Nationwide policyholder to cancel an insurance contract with Nationwide. Further, the agency agreement between Nationwide and the agent provided that either party had the right to cancel the agreement at any time after written notice had been given.

Nationwide terminated its agency contract with Darden in November 1980. One month later, Darden opened a new business as an independent insurance agent and proceeded to represent various competitors of Nationwide. Moreover, Darden operated the new business at the same

location he had previously used as a Nationwide agent. Consequently, Nationwide notified Darden that it would not pay him any of the benefits to which he otherwise would have been entitled under the ASCP. In November 1983, Darden brought suit under ERISA to recover the benefits.

Under ERISA, benefits from a pension plan become nonforfeitable after the plan has vested.[1] *See* 29 U.S.C. § 1053(a); *Petr v. Nationwide Mut. Ins. Co.*, 712 F. Supp. 504, 506 (D. Md. 1989). The nonforfeitability provision protects only "employees" and then only if the benefit arrangement is an employee "pension benefit plan." *See* 29 U.S.C. §§ 1132(a), 1002(2)(A), 1002(7); *Wolcott v. Nationwide Mut. Life Ins.*, 884 F.2d 245, 250 (6th Cir. 1989). In May 1985, the district court granted Nationwide's motion for summary judgment on the ground that Darden did not qualify as an "employee" within the scope of ERISA and, therefore, had no enforceable rights against Nationwide under ERISA. On appeal, we vacated the district court's judgment, holding that the traditional common-law test for determining the meaning of "employee," which the district court had applied, was "not the appropriate standard" to apply in a case arising under ERISA. *Darden I*, 796 F.2d at 706. Our *Darden I* opinion set forth a three-part test for determining whether an individual is an employee as contemplated by ERISA. To qualify as an "employee," a claimant must establish: (1) that he had a reasonable expectation that he would receive the benefits, (2) that he relied on this expectation, and (3) that he lacked the economic bargaining power to contract out of the forfeiture provisions. *Id.* at 706-07. We held that the first prong of the three-part test had been satisfied, concluding

[1] The vesting period is determined by one of three methods. *See* 29 U.S.C. §§ 1053(a)(2)(A), 1053(a)(2)(B), and 1053(a)(2)(C). Under any of the three methods, Darden's agreement vested. *Darden I*, 796 F.2d at 703 n.1.

that by "establishing a comprehensive retirement benefits program for its insurance agents, Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him." *Id.* at 707. However, the case was remanded for further factual findings relating to the second and third prongs.

On remand, the district court found that Darden both relied on the benefits plan and lacked sufficient economic bargaining power to contract out of the forfeiture clauses. It concluded that Darden was an "employee" under ERISA. The district court also found that the Deferred Compensation Plan was a "pension plan" for purposes of ERISA and awarded Darden the benefits he had accrued under that component of the ASCP. The court, however, in a summary judgment ruling held that the Extended Earnings Plan was not a "pension plan" and accordingly denied Darden those benefits.

II. Darden's Status as an Employee

Since we had determined in *Darden I* that Darden had satisfied the first prong of the three-part "employee" test, the chore on remand was to decide if Darden satisfied the other two prongs of the *Darden I* definition of "employee." Our *Darden I* opinion, however, did not leave the page on the remainder of the definition completely blank. We outlined the parameters of the reliance requirement, stating that persons within the protected class must have relied on that expectation of retirement payments by remaining for " 'long years,' or a substantial period of time, in the 'employer's' service, and by foregoing other significant means of providing for their retirement." *Darden I*, 796 F.2d at 706. We found that Darden's many years of service and his having foregone equity (since upon his termination all rights revert back to Nationwide) evidenced his reliance. *Darden I*, 796 F.2d at 707. However, we also stated that there was no indication in the record as to whether Darden pursued other

methods of providing for his retirement which would have significantly reduced his reliance on the Nationwide benefit plan or whether a failure to make such alternative provisions would have been reasonable in light of the common practices of other Nationwide insurance agents. *Id.*

The district court found that Darden had pursued alternative means of providing for his retirement. Darden had eight life insurance contracts worth $22,300 in 1980 and he had approximately $60,000 in mutual funds and cash deposits. Finally, Darden had an annuity with a cash surrender value in 1980 of $9,400 and IRA investments totalling $8,402. However, the district court concluded that these amounts "did not significantly reduce [Darden's] reliance" on the benefits plan and that Darden satisfied the second prong of the definition because he had relied on his benefit plan.

The district court also found that Nationwide explicitly encouraged its agents to rely on the ASCP as a means for providing for their retirement. An audio-visual program, prepared by Nationwide in 1980 to explain the ASCP to its agents, stated:

> Your [Deferred Compensation Plan] is a foundation upon which to build a total retirement plan. Along with such plans as HR-10's and IRA's, it can provide a more-than-adequate retirement income. The other part of the foundation is Extended Earnings.

The court found that Darden, like most Nationwide agents, did not invest in the Nationwide Retirement Plan (the HR-10 Plan) and that over forty percent of Nationwide agents had neither an IRA nor an HR-10 Plan. It concluded that, in light of Nationwide's explicit encouragement and the common practices of other Nationwide agents, Darden's reliance on the ASCP was "reasonable."

On appeal, Nationwide argues that the three-prong test outlined in *Darden I* is inappropriate and that this court,

like other courts of appeals have done, should determine an employee's status under ERISA according to common-law principles. *See Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250-51 (6th Cir. 1989); *Holt v. Winpisinger*, 811 F.2d 1532, 1538 n.44 (D.C. Cir. 1987). That, however, is an argument wasted on this panel, for *Darden I* is, of course, controlling precedent in this circuit.

Nationwide also contends that the district court's finding that Darden relied on the plan was clearly erroneous. It argues that Darden was a self-reliant entrepreneur, wholly responsible for his current income, and not a financial "dependent" of Nationwide. Concomitantly, it urges that the other advantages of Nationwide affiliation, such as the quality of insurance offered by Nationwide, competitive premium rates and name recognition, provided the true inducement for Darden's services. Nationwide also stresses that Darden actively pursued a number of financial arrangements that significantly reduced any reliance on the ASCP, and that any failure to make alternative provisions would have been unreasonable in light of the common practices of other Nationwide agents. Finally, in this factual context, Nationwide argues that the district court erred in limiting its consideration of Darden's alternative retirement arrangements to formal savings plans and instead should have also considered the personal assets accumulated by an individual during his working lifetime.

Several of Nationwide's contentions, such as the inducement to work for Nationwide and Darden's alleged status as an independent entrepreneur, have little to do with the relevant inquiry—whether Darden relied on these benefits. Nationwide's other contentions challenge the factual findings of the district court and, after a thorough review of the record, we cannot conclude that the findings were clearly erroneous.

Concerning the third prong of the employee test, the district court found that there was a "significant" dis-

parity in bargaining power between Nationwide and its agents. We agree. Although Nationwide received input from its agents through the Agent Company Advisory Council, Nationwide did not obligate itself to heed such advice. The record indicates that Nationwide specifically rejected proposals by Nationwide agents to change the forfeiture clauses. In fact, Nationwide never suggests that Darden had sufficient economic bargaining power. Consequently, the district court correctly concluded that Darden "lacked sufficient economic bargaining power to obtain the contractual right to nonforfeitable retirement benefits from Nationwide."

In sum, we agree with the district court's conclusion that Darden was an employee under ERISA.

III. The Deferred Compensation Plan

The protections flowing from "vesting" under ERISA apply only to a "pension plan." "Pension plan" and "employee pension benefit plan" are defined as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A).

The Deferred Compensation Plan is financed through contributions made by Nationwide on the agent's behalf to a group annuity fund. The contribution for each agent is based upon a percentage of the original and renewal fees which he has earned. The agent is eligible to participate in the plan after completion of five years of service. A plan participant may elect to receive early reduced deferred compensation benefits at his termination upon reaching age 50 with the percentage of benefits payable gradually increasing up to age 60. Benefits are paid over a period of three to ten years or as a life annuity.

Darden elected to have his benefits paid in the form of a life annuity. At the time of his termination in 1980, Darden had accumulated deferred compensation incentive credits totalling $28,664.56. These credits were to be deferred until Darden's 60th birthday on June 1, 1994, when lifetime monthly payments would commence on the basis of annuity rates then in effect. The monthly amount would have been approximately $205.

Based on these facts, the district court concluded that Nationwide's Deferred Compensation Plan "provides retirement income to employees and is an employee pension benefit plan under ERISA." Nationwide disagrees, contending that the Deferred Compensation Plan was not intended to serve as a pension plan but that it was designed to offer an incentive to agents during their working careers. For that reason, Nationwide points out, the plan "disproportionately reward[s]" those persons who generate more sales and therefore earn greater commissions.

We agree with the district court that the Deferred Compensation Plan represented an ERISA "pension plan," which provided retirement income to employees or resulted in the deferral of income extending beyond the

termination of employment.[2] Nationwide represented that the Deferred Compensation Plan was a retirement plan. Nationwide's own witnesses acknowledged that one of the purposes of the Plan was to provide retirement benefits and its audio-visual suggested the same. Darden, like other Nationwide agents, considered the payments as part of their retirement scheme.[3]

IV. The Extended Earnings Plan

The Extended Earnings Plan compensates an agent by paying him a sum equal to his earnings from renewal fees over the prior twelve months. The district court, basing its decision largely on our holding in *Fraver v. North Carolina Farm Bureau Mut. Ins. Co.*, 801 F.2d 675 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 1375 (1987),

[2] In addition to the court below, three other district courts have reached similar conclusions concerning the plan we consider here. *See Plazzo v. Nationwide Mut. Ins. Co.*, 697 F. Supp. 1437, 1450 (N.D. Ohio 1988) ("[i]n view of the benefit accrual and distribution features of the Deferred Compensation Plan, the court concludes that it provides retirement income to employees and is an employee pension benefit plan under ERISA"), *rev'd on other grounds*, 892 F.2d 79 (6th Cir.), *cert. denied*, 111 S. Ct. 370 (1990); *Wolcott v. Nationwide Mut. Ins. Co.*, 664 F. Supp. 1533, 1538 (S.D. Ohio 1987) ("[t]he Court concludes that the Deferred Compensation Plan provides retirement income to employees and is an employee pension benefit plan under ERISA"), *rev'd on other grounds*, 884 F.2d 245 (6th Cir. 1989); *Petr v. Nationwide Mut. Ins. Co.*, 712 F. Supp. 504, 507 (D. Md. 1989) ("the Court . . . join[s] these [other] courts in concluding that the [Deferred Compensation] Plan is a pension plan within the meaning of ERISA") (emphasis omitted).

[3] In *Darden I*, we also directed the district court to consider whether the ASCP fell within an ERISA exception, which exempts any plan which is unfunded and applicable only to a select group of highly compensated employees. *Darden I*, 796 F.2d at 708-09; 29 U.S.C. § 1051(2). On remand, the district court held that while the Deferred Compensation Plan was unfunded, it did not apply to a select group of highly compensated employees. On appeal, Nationwide does not contest this conclusion.

held that the Extended Earnings Plan did not constitute a pension plan under ERISA. In *Fraver*, we addressed a benefits plan similar to the Extended Earnings Plan at issue in the instant case. In *Fraver*, as here, the insurance company agreed to pay an amount equal to the renewal commissions of the final twelve months following termination of service. In concluding that such an agreement did not constitute a pension plan, we stated:

> The post-termination benefits are calculated on the basis of the agent's commissions for the prior year and, in that respect, are like a final commission, paid over an extended term.
>
> . . . .
>
> The amount of the payment is tied to only one factor, the amount of business in the last year prior to termination. Finally, the payments are recouped from the individual's successor. In sum, the benefits are in the nature of a buy-out in which the departing agent receives payments based on what he leaves behind in the way of business for his successor. If the departing agent goes into competition with his successor, he is destroying the resource that would be used to pay him.

Fraver, 801 F.2d at 678.

On his cross-appeal, Darden contends that the Extended Earnings Plan, like the Deferred Compensation Plan, is a pension plan. He argues that the ASCP is a single plan and if we hold that the Deferred Compensation Plan is a pension plan we likewise must find the Extended Earnings Plan to be a pension plan. We disagree. While both the Deferred Compensation Plan and the Extended Earnings Plan are components of a single plan, they have distinct purposes, employ distinct terms and impose distinct obligations. The district court did not err in analyzing the plans separately.

Darden relies on *Plazzo v. Nationwide Mut. Ins. Co.* in support of his position. In *Plazzo*, an Ohio federal district court held that an Extended Earnings Plan, such as the one at issue in the instant case, is not a "buy-out," but rather a pension plan. *Plazzo*, 697 F. Supp. at 1450-51. Darden impliedly requests that we discard the holding in *Fraver* and adopt the position taken by the court in *Plazzo*. However, two other district courts, analyzing the same issue, concluded that an Extended Earnings Plan is not a pension plan under ERISA. *See Petr*, 712 F. Supp. at 507; *Wolcott*, 664 F. Supp. at 1539. More importantly, the Extended Earnings Plan at issue here closely parallels the benefit agreement in *Fraver* and the outcome here is controlled by that precedent.

In view of the above, the judgment of the district court is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

ROBERT T. DARDEN,
Plaintiff

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, *et al.*,
Defendants

MEMORANDUM OPINION

[Filed July 5, 1989]

Robert T. Darden, a former insurance agent for Nationwide Mutual Insurance Company, brought this action against Nationwide on November 8, 1983, seeking to recover retirement benefits pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* This court initially granted Nationwide's motion for summary judgment on the ground that Darden did not qualify as an employee within the scope of ERISA and therefore had no enforceable rights against Nationwide under the Act. This decision was vacated on appeal to the Fourth Circuit, which held that the traditional common law test applied by this court for identifying the relationship of master and servant was "not the appropriate standard for application here." *See Darden v. Nationwide Mutual Insurance Company*, 796 F.2d 701, 706 (4th Cir. 1986). The Court of Appeals set forth a three-part test

for determining whether an individual who does not fit within the traditional concept of employee status should nonetheless be considered an employee in the context of ERISA. The case was remanded for further factual development in light of the new standard, and the parties subsequently filed cross-motions for summary judgment which were denied. A two-day bench trial was held, and the court is now prepared to enter its findings.

I. BACKGROUND

The facts of this case were summarized by the Fourth Circuit as follows:

> From 1962 until November 1980, Darden acted as an insurance agent for Nationwide Insurance Company in Fayetteville, North Carolina. During that period, Darden represented Nationwide exclusively. While Darden enjoyed a substantial degree of freedom to operate his agency as he chose, his freedom was limited by a number of requirements imposed by Nationwide. Darden was compensated through commissions, rather than through a fixed salary.
>
> The relationship between Darden and Nationwide was governed by a series of eight successive agency contracts. Each of the agency contracts provided for Darden's participation in a retirement and deferred compensation plan for insurance agents referred to as the "Agent's Security Compensation Plan." The Agent's Security Compensation Plan consisted of two programs known as the "Deferred Compensation Incentive Credit Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Incentive Credit Plan, Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies. Under the Extended Earnings Plan, Nationwide agreed to

> pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months. The agency agreements also provided for Nationwide's obligation to pay benefits under the Agency's Security Compensation Plan would terminate if a former agent engaged in the fire, casualty, health, or life insurance business, in competition with Nationwide, within one year of the cancellation of the agent's agreement with Nationwide and within a twenty-five mile radius of the former business location of the agent. Nationwide's obligation would also cease if the former agent, at any time after the cancellation of his agency agreement with Nationwide, induced a Nationwide policyholder to cancel an insurance contract with Nationwide. The agency agreements between Nationwide and Darden provided further that either party had the right to cancel the agreement at any time after written notice.
>
> Nationwide exercised its right to terminate the agreement on November 20, 1980. One month following the termination of the agreement, Darden opened a new business as an independent insurance agent, representing various competitors of Nationwide. He operated the new business at the same location he had previously used as a Nationwide agent. Nationwide then notified Darden that it would not pay him any of the benefits to which he otherwise would have been entitled under the Agent's Security Compensation Plan.
>
> * * * *
>
> Darden filed the present action on November 8, 1983, seeking to benefit from the terms of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Under ERISA, an employee's right to receive retirement benefits from an employer-sponsored retirement plan must vest, there-

> by becoming nonforfeitable, after a period of time to be determined according to one of three alternative methods. 29 U.S.C. § 1053(a). [footnote omitted] Darden based his claim to relief on § 502(a) of the Act, 29 U.S.C. § 1132(a), which provides that a participant in or a beneficiary of an employee retirement income security plan may bring a civil action to enforce the provisions of the Act and to recover benefits due to him. Darden accordingly sought to enforce the Act's nonforfeitability requirements and to recover the benefits claimed to be due to him under the provision of Nationwide's Agent's Security Compensation Plan.

796 F.2d at 702-04.

The Court of Appeals identified three factors to be considered in determining whether an individual is an employee within the meaning of ERISA: (1) Whether the "employer" or sponsor of the pension plan took some action that created a reasonable expectation on the "employees'" part that benefits would be paid to them in the future; (2) whether persons within the protected class relied on that expectation by (a) remaining for "long years," or a substantial period of time, in the "employer's" service, and (b) by foregoing other significant means of retirement; and (3) whether the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits. 796 F.2d at 706-07.

The Court found that the first prong of this test had been satisfied: "By establishing a comprehensive retirement benefits program for its insurance agents, Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him." 796 F.2d at 707. The record was found to be incomplete, however, with respect to the second two prongs concerning reliance and bargaining power.

Nationwide argued on appeal that, even if Darden is assumed to be an employee for purposes of ERISA, its plan is not subject to the vesting and nonforfeitability requirements of § 1053(a) by virtue of § 1051(2), which exempts from those requirements any plan "which is unfunded and which is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." The Court found that disputed questions of fact prevented summary judgment disposition of this issue.

Upon remand, further discovery was conducted, and the parties filed cross-motions for summary judgment. This court, applying the reasoning of *Fraver v. North Carolina Farm Bureau*, 801 F.2d 675 (4th Cir. 1986), found that the Extended Earnings component of the Agent's Security Compensation Plan is not a "pension plan" within the meaning of ERISA. However, this court declined to summarily judge whether the Deferred Compensation component is a "pension plan" or whether Darden was an "employee" under ERISA. A two-day bench trial was held to resolve the factual questions underlying these two issues and also the issue of whether the Deferred Compensation Plan qualifies for the "top-hat" exemption under § 1051(2).

II. IS DARDEN AN "EMPLOYEE" WITHIN THE MEANING OF ERISA?

The employment issue is to be resolved by applying the three criteria devised by the Fourth Circuit for determining whether an individual is an employee under ERISA. The Court of Appeals found that the first prong concerning whether Darden had a reasonable expectation of retirement benefits was satisfied, based on the comprehensive retirement benefits program created by Nationwide for its insurance agents. This court therefore need only address the second and third prongs of the

ERISA employment test dealing with reliance and bargaining power.

A. *Reliance*

Darden must have relied on the expectation of retirement benefits by (1) remaining as a Nationwide agent for a substantial period of time and by (2) foregoing other significant means of providing for his retirement. *See Darden*, 796 F.2d at 706. His eighteen years of service, which the Court of Appeals noted exceeds the time required for the vesting of benefits under any of the three methods described in 29 U.S.C. § 1053(a), is clearly a substantial period. With respect to the loss of retirement opportunities, the Court found that "Darden was obliged to forego at least one alternative method of providing for his retirement that would normally have been available to an independent contractor: because much of the value of a Nationwide agency reverted to Nationwide upon the agent's termination, Darden was not able to build up equity in his business which could have eventually been transformed into cash through the sale of the business." *Id.* at 707. However, the Court also found that "there is no indication in the record as to whether Darden pursued other methods of providing for his retirement which would have significantly reduced his reliance on the Nationwide benefit plan. Nor is there any evidence as to whether a failure to make such alternative provisions would have been reasonable in light of the common practices of other Nationwide insurance agents." *Id.* These two questions—whether Darden made alternative provisions for his retirement and, if not, whether the failure to do so was reasonable—must now be decided.

At the time of his termination in 1980, Darden had accumulated Deferred Compensation Incentive Credits totalling $28,664.56. These credits were to be deferred until Darden's 60th birthday on June 1, 1994, when lifetime monthly payments would commence on the basis of

annuity rates then in effect. The monthly amount, assuming no change in rates between December 1, 1980 and June 1, 1994, would have been $205.57. Darden's personal net worth when he was terminated, disregarding the retirement benefits at issue here and the value of his agency, was approximately $450,000. His assets included eight life insurance contracts with a total cash surrender value in 1980 of $22,300, shares in mutual funds totalling $33,267, and deposits at several banks of approximately $27,000. Darden's financial planning for retirement, again leaving aside the Nationwide plan, consisted of an annuity with a cash surrender value in 1980 of $9,400 which will produce monthly payments of $134.75 beginning in 2004, and IRA investments totally $8,402. Although Darden therefore did pursue alternative means of providing for his retirement, the court finds that the amounts invested did not significantly reduce his reliance on the deferred compensation benefits.

Nationwide explicitly encouraged its agents to rely on the Agent's Security Compensation Plan as a means of providing for their retirement. An audio-visual program prepared by Nationwide in 1980 to explain the plan to its agents stated:

> Your DCIC [Deferred Compensation Incentive Credit] is a foundation upon which to build a total retirement plan. Along with such plans as HR-10's and IRA's, it can provide a more-than-adequate retirement income. The other part of the foundation is Extended Earnings.

Like most Nationwide agents, Darden did not invest in the Nationwide Agents' Retirement Plan, a Keogh (HR-10) plan. A study was conducted by Nationwide's Office of Research to determine the reasons for low participation in this plan. According to the 1983 Final Report, only 4% of the agency force participated in the Nationwide Agents' HR-10 Plan, and only 28.8% of the agents

surveyed had an HR-10 plan of any kind. 42.6% of the agents reported having an IRA, 42% had neither an IRA nor an HR-10, and just 13% had both an HR-10 and an IRA. The court concludes that, although Darden had the financial resources to reduce his reliance on the Deferred Compensation Plan, his failure to do so was reasonable in light of both the common practices of other Nationwide agents and Nationwide's explicit encouragement of its agents to rely on the plan.

B. *Bargaining Power*

The third factor to be considered in determining whether Darden is an "employee" under ERISA is whether he "lacked sufficient bargaining power to obtain contractual rights to nonforfeitable benefits." 796 F.2d at 707. The Court of Appeals noted that "[e]vidence of the extent of the 'employer's' control may, of course, be relevant to a determination of relative bargaining power." *Id.* Nationwide points out that this court previously determined, and the Court of Appeals strongly implied, that Nationwide lacked the control over Darden necessary to establish employee status under the traditional common law standard. *See id.* at 705. This court found the parties' relationship was such that "it was primarly through the plaintiff's own efforts, ingenuity, and good business sense that he made money, and not through any employment relationship with Nationwide." *Darden v. Nationwide Mutual Insurance Co.*, No. 83-96-CIV-3 (E.D.N.C. May 22, 1985). In other words, the terms of the relationship between Darden and Nationwide gave Darden enough control over his own business activities for him not to be considered an employee under the traditional common law standard. The bargaining power element of the new standard, however, does not concern the control *allowed* by the terms of a business relationship, but rather the control *over* those terms. The fact that the terms of Darden's relationship with Nationwide

gave Darden extensive control over his business activities does not necessarily mean that Darden, or Nationwide agents generally, had sufficient power to bargain over those terms. Indeed, the evidence is that they did not.

The eight successive Agent's Agreements signed by Darden during his service with Nationwide were uniform and signed by all Nationwide agents in North Carolina. An agent was required to sign the uniform agreement as a condition of his service. An outline of changes in the agreement made in 1980 advised agents that "[a]s in the past, our position will be that any agent refusing to sign the new Agreement will have his or her existing Agreement cancelled as of 1/1/81." Although Nationwide received input from its agents via the Agent Company Advisory Council, the Council's role was simply that: advisory. Nationwide was not obliged to follow any advice it received from the Council. More importantly, Nationwide clearly felt free to disregard any advice it received, as evidenced by the 1978 Advisory Council Meeting at which the benefit forfeiture provisions at issue here were discussed. According to the minutes of that meeting:

> [T]here was a concern expressed regarding vesting of deferred compensation. One delegate felt that any Deferred Compensation Incentive Credits should be fully and permanently vested in the writing agent's name with no losses possible through either qualified or non-qualified cancellation of the Agent Agreement.
>
> Mr. Wagner [Nationwide's Vice-President for Margeting Services] responded regarding the vesting of DCIC . . . .
>
> The Companies have no intention of making Agent Security Compensation payments and then permitting the agent to compete with the Companies for

> the business in the portfolio. The Independent Contractor or agent can choose to compete for the business and forego benefit payments or accept benefit payments and not compete.

At the same 1978 meeting one delegate proposed that a retiring agent should have the right to negotiate a separate agreement with another Nationwide agent to transfer the agency, instead of it reverting to Nationwide.[1] Mr. Wagner responded that "[a]s far as an agent negotiating with someone else, in order for a contract to exist, there must be agent ownership of the business. He said that at Nationwide that was not the case and there was no possibility of that occurring." The Advisory Council's various recommendations to increase Extended Earnings were also rejected, due to unforeseen increases in the cost of funding the Agent's Security Compensation Plan:

> Mr. Wagner said that this type of increase had not been anticipated in the original projections and there could be problems in the future. Additional dollars would have to come from increased productivity. There was no way that it was possible to increase the Extended Earnings through the suggestions which had been made.

Of course, a party's intransigence with respect to any particular contractual provision could merely reflect the importance it attaches to that provision and not necessarily a general superiority in bargaining power. But when a party takes a "hard-line" position over a broad range of issues, as Nationwide appears to have done, the latter conclusion is inevitable. The court thus finds there is a significant disparity in bargaining power between

[1] The Court of Appeals noted that this reversion deprived Darden of a means of providing for his retirement, since he was unable to build up equity in his business which could be eventually be transformed into cash through its sale. *See* 796 F.2d at 707.

Nationwide and its agents. Specifically, the court finds that Darden, and Nationwide agents as a group, lacked sufficient economic bargaining power to obtain the contractual right to nonforfeitable retirement benefits from Nationwide.

The court concludes that Darden was an employee of Nationwide within the meaning of ERISA, 29 U.S.C. § 1002(6).

III. IS THE DEFERRED COMPENSATION PLAN A "PENSION PLAN" UNDER ERISA?

ERISA defines the terms "pension plan" and "employee pension benefit plan" as

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A). Under the Deferred Compensation Plan, agents who have completed five years of service with Nationwide are annually credited with a specified percentage of their original and renewal fees from the previous year. The plan is financed through deposits made by Nationwide into a group annuity fund. Participants may receive early reduced benefits upon retirement or cancellation at age 50 or one hundred percent

of accrued benefits commencing at age 60. Benefits are payable over a three-year period unless a longer payout schedule is elected. The court concludes, as have two other courts, that Nationwide's Deferred Compensation Plan provides retirement income to employees and is an employee pension benefit plan under ERISA. *See Plazzo v. Nationwide Mutual Insurance Co.*, 697 F. Supp. 1437, 1450 (N.D. Ohio 1988); *Wolcott v. Nationwide Mutual Insurance Co.*, 664 F. Supp. 1533, 1539 (S.D. Ohio 1987).

IV. IS THE DEFERRED COMPENSATION PLAN AN UNFUNDED PLAN MAINTAINED PRIMARILY FOR THE PURPOSE OF PROVIDING DEFERRED COMPENSATION FOR A SELECT GROUP OF HIGHLY COMPENSATED EMPLOYEES?

29 U.S.C. § 1051(2) exempts from the vesting and nonforfeitability requirements of § 1053(a) any pension plan "which is unfunded and which is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." The Court of Appeals remanded the issue of whether this "top-hat" exemption applies to the Nationwide plan because the relevant facts were in dispute.

A. *Is the plan "funded"?*

The Nationwide defendants set aside money for the payment of deferred compensation benefits by making annual deposits into an "accumulation fund" maintained by defendant Nationwide Life Insurance Company pursuant to a group annuity contract. The amounts deposited generally reflect the present dollar value of the future benefits accrued during that year. The accumulation fund is credited with interest earned and debited for expenses. Withdrawals may be made from the fund at any time and for any reason upon written notice.

When one of the Nationwide defendants notifies Nationwide Life that an annuity is to be purchased on the life of a specified person, Nationwide Life withdraws the necessary amount from the fund and commences payment of the annuity to the purchasing company.

The ERISA statute does not define the term "unfunded plan." However, the Eighth Circuit has stated that "[f]unding implies the existence of a *res* separate from the ordinary assets of the corporation." *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214 (8th Cir. 1981). *Accord, Belka v. Rowe Furniture Corp.*, 571 F. Supp. 1249, 1251-52 (D. Md. 1983). In *Dependahl* the employer purchased life insurance policies on the lives of certain employees, whose named beneficiaries were to receive annuity income benefits upon the employee's death. The Eighth Circuit affirmed the district court's finding that this was a funded plan:

> All whole-life insurance policies which have a cash value with premiums paid in part by corporate contributions to an insurance firm are funded plans. The employee may look to a *res* separate from the corporation in the event the contingency occurs which triggers the liability of the plan.

653 F.2d at 1214. This holding was subsequently distinguished by the Eighth Circuit in *Belsky v. First National Life Insurance Company*, 818 F.2d 661 (8th Cir. 1987). *Belsky* involved an executive compensation plan which provided for a bank to "informally fund the benefits" by purchasing life insurance policies on each participating employee. *See Belsky v. First National Life Insurance Co.*, 653 F. Supp. 80, 82 (D. Neb. 1986). As the sole owner and beneficiary of these policies, the bank could pay its obligations either by using the cash value of the policies or by using other funds. The bank's obligations were set forth in separate agreements entered into with each employee. These agreements provided that

any insurance policy or other asset acquired by the bank in connection with its liabilities under the agreement would not be held in trust for the employee's benefit, but instead "shall be, and remain, a general, unpledged, unrestricted asset of the Bank." The district court found that this was an unfunded excess benefit plan not covered by ERISA. *See* 29 U.S.C. § 1003(b)(5). The Eighth Circuit affirmed, distinguishing *Dependahl* as follows:

> Belsky's agreement with the Bank is in sharp contrast to the terms of the *Dependahl* plan. First, in addition to death benefits, Belsky's agreement also provides for retirement and disability benefits . . . . Mort importantly, the agreement does not mandate that the Bank had or would acquire assets to finance the liabilities assumed in the agreement. While it is evident that the Bank obtained the insurance policy with the intention that it could be used in funding the Plan, the language of the Plan, unlike that of the *Dependahl* plan, specifically avoids making a direct tie between the insurance policy and the Plan. . . . Under the plan as drawn, the cash value of the policy simply became a general, unpledged, unrestricted assest of the Bank and those Bank assets in turn would be used to fund Beksky's plan. Thus, we cannot conclude that the district court erred in finding that there was no *res* separate from the corporation to which Belsky could look to satisfy the liability of the plan. In short, the Bank's plan so differs from the one in *Dependahl* that *Dependahl* is not controlling.

818 F.2d at 663-64.

Dependahl is inapplicable here for similar reasons. Darden's agreement with Nationwide, like Belsky's agreement with the bank, did not require Nationwide to acquire assets to finance its deferred compensation liabilities. The money which Nationwide sets aside for the

purchase of life annuities does not necessarily correspond to the value of the deferred compensation credits which have accrued. Nor is this money committed to the payment of deferred compensation benefits, since the group annuity contract does not restrict Nationwide's right to use the accumulation fund for general corporate purposes. Indeed, one million dollars were withdrawn from the fund in 1986 to meet general cash-flow obligations. Conversely, Nationwide is free to purchase the life annuities out of other assets. The accumulation fund, like the life insurance policies in *Belsky*, is a general, unpledged, unrestricted asset which Nationwide uses to meet its deferred compensation obligations. The fund is not a *res* separate from the defendant corporations to which Darden could look to enforce his entitlement under the plan. The court therefore finds that the Deferred Compensation Plan is an "unfunded" plan for purposes of the top-hat exemption.[2]

B. *Is the plan limited to a "select group of management or highly compensated employees"?*

In addition to being "unfunded," the Deferred Compensation Plan must also be limited to a "select group of management or highly compensated employees" in order to qualify for the exemption from ERISA's vesting and nonforfeitability requirements. Two courts have found that the plan is not so limited and therefore not exempt. *See Plazzo, supra*; *Wolcott, supra*. Both of these opinions focus on the "highly compensated" language without treating the "select group" language as a separate and

---

[2] This finding is contrary to, but not inconsistent with, the conclusion reached in *Wolcott, supra*, 664 F. Supp. at 1539, that the Deferred Compensation Plan is funded. Nationwide presented no evidence in that case to rebut the plaintiff's affidavit testimony in support of a motion for summary judgment that the plan is funded and that benefits accrue on an annual basis in a group annuity contract. The court therefore had no choice but to find for the plaintiff on this issue.

distinct requirement. The Court of Appeals noted in the present case, however, that "[t]he term 'select group' seems to imply a small percentage of the total number." *Darden*, 796 F.2d at 708. It remanded this question since there was no evidence in the record as to the percentage of Nationwide's total employee complement who participated in the Agent's Security Compensation Plan. A separate analysis of the "select group" and "highly compensated" provisions is therefore appropriate.

(1) "Select group"

The parties disagree as to which agents should be counted as participants in the plan for purposes of determining whether they comprise a "select group." ERISA defines the term "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any kind from an employee benefit plan . . ." 29 U.S.C. § 1002(7). Darden focuses on the "may become eligible" language in arguing that the plan participants include not only all Nationwide agents who have entered into the standard agent's agreement, but also the "NADP agents" who are in training during their initial two years of employment and have not entered into the standard agreement. Since these agents are not eligible to participate in the company-wide pension plan but may become eligible for the Agent's Security Compensation Plan, Darden contends they should be counted as participants in the plan. The average number of agents during the years 1976, 1977, 1979 and 1980, including the NADP agents, was 5316 out of a total average workforce of 20,544, or 25.9%. Nationwide argues, on the other hand, that only those agents who have completed five years of service should be counted as plan participants, since the plan requires five years of service to qualify for benefits. The average number of agents with five years service in the years 1976, 1979 and 1980 was 3272 out of a total average workforce of 20,845, or 15.7%.

Nationwide's proposed method of calculating the number of plan participants was rejected in *Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*, 643 F. Supp. 633, 641 (E.D.N.C. 1985), rev'd on other grounds, 801 F.2d 675 (1986):

> The five year service requirement is not a plan parameter defining who was covered by the plan, but is a vesting provision equally applicable to all plan members. That a vesting provision is not to be considered as a plan parameter is clearly indicated by the definition of "participant" in ERISA . . .

Nationwide nevertheless argues that the *Fraver* court incorrectly decided this question and that its five year service requirement is not a vesting provision but rather a condition of eligibility for participating in the Deferred Compensation Plan. However, the distinction between vesting and eligibility requirements is irrelevant for determining who is a plan participant under ERISA, since included within the statutory definition of "participant" are employees who "may become eligible to receive a benefit." Thus, those employees who have not satisfied the eligibility requirements for the plan must still be counted as "plan participants" if they *may* satisfy those requirements. In other words, the relevant question is not whether the employee *has* satisfied the eligibility requirements, but whether he is *eligible* to satisfy the eligibility requirements. Since all Nationwide agents who have entered into the standard agent's agreement "may become eligible" for deferred compensation benefits by completing five years of service, they should all be counted as participants in the plan. As in *Fraver*, 643 F. Supp. at 633, "[t]he employment contracts of *all* such persons contain the plan provisions . . ." On the other hand, since the employment contracts of the NADP agents do not contain the plan provisions, they should not be counted as participants. Darden is, of course, correct that these agents may become eligible for deferred compensation benefits

by entering into the standard agreement and completing five years service. But that is no less true of any other employee at Nationwide. To aviod the absurd result of counting all employees as plan participants, the court finds that only those agents who have entered into the standard agent's agreement should be so counted. The average number of such agents during the years 1976, 1977, 1978, and 1980 was 3841 out of a total average workforce of 20,544, or 18.7%.

Having identified the relevant "group" and its size as a percentage of the total workforce, the next question is whether this group is "select." Prior cases, as noted above, have not analyzed the "select group" provision separately from the "highly compensated employee" provision. Indeed, only one court has even bothered to identify the group in question as a percentage of the total workforce. *See Belka v. Rowe Furniture Corp., supra* at 1252 (plan covering only 4.6% of total employees was limited to a select group of highy compensated employees). The only other authority on this point is two opinion letters by the Department of Labor holding that plans covering fewer than 4% and 0.2% of employees were limited to select groups. *See* U.S. Department of Labor Opinion Letters 75-64 (August 1, 1975) and 75-48 (December 23, 1975). Although these decisions do not demarcate the upper range of "select groups," the court finds that the group in question here, comprising almost one-fifth of the total Nationwide workforce, is too large to be considered "select" for purposes of the top-hat exemption.

(2) "Highly compensated"

The average gross income (commissions plus benefits) for Nationwide agents (excluding NADP agents) in 1980, the year Darden was terminated, was $49,340. The 1980 average total compensation (salarly plus benefits) for all non-agent employees was $19,121 and for management

employees was $24,501. As the Court of Appeals pointed out, however, the agents' compensation must be adjusted "so as to be comparable to the compensation paid to salaried employees." *Darden*, 796 F.2d at 709. Such an adjustment requires subtracting the agents' business expenses from their gross income, expenses which salaried employees do not incur. According to the 1980 "Agent's Office Management Guide," prepared to enable agents to compare their expenses with that of other agents in the same income group, the average total agency expense as a percent of total agency income for the $43,000 to $57,999 gross income range was 36.1%. The average net income for Nationwide agents in 1980 ($49,340—36.1% ($17,812)) was therefore $31,528.

The court finds on the basis of this evidence that Nationwide agents are not a "select group" of "highly compensated employees" within the meaning of 29 U.S.C. § 1051(2). The court concludes that the Deferred Compensation Plan is subject to the nonforfeiture provisions of § 1053(a). Darden is therefore entitled to receive his accrued deferred compensation benefits when he attains the age of 60.

SO ORDERED this 30th day of June, 1989.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1623

ROBERT T. DARDEN,
Appellant,

versus

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
and NATIONWIDE LIFE INSURANCE COMPANY,
Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Fayetteville
Terrence W. Boyle, District Judge
(83-96-CIV-3)

Argued: December 3, 1985 Decided: July 15, 1986

Before MURNAGHAN, SPROUSE and SNEEDEN,* Circuit Judges.

Marion G. Follin, III (Smith, Patterson, Follin, Curtis, James & Harkavy on brief) for Appellant; Walker Y. Worth, Jr. (Russ, Worth & Cheatwood on brief) and

* The Honorable Emory M. Sneeden resigned from the court before the case was decided. He did not participate in the decision.

Craig G. Dalton, Jr. (Moore, Ragsdale, Liggerr, Ray & Foley, P. A. on brief) for Appellees.

MURNAGHAN, Circuit Judge:

Robert Darden appeals from the decision of the United States District Court for the Eastern District of North Carolina granting summary judgment for defendant Nationwide Mutual Insurance Company on Darden's claim for retirement benefits on the basis of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*

I.

From 1962 until November 1980, Darden acted as an insurance agent for Nationwide Insurance Company in Fayetteville, North Carolina. During that period, Darden represented Nationwide exclusively. While Darden enjoyed a substantial degree of freedom to operate his agency as he chose, his freedom was limited by a number of requirements imposed by Nationwide. Darden was compensated through commissions, rather than through a fixed salary.

The relationship between Darden and Nationwide was governed by a series of eight successive agency contracts. Each of the agency contracts provided for Darden's participation in a retirement and deferred compensation plan for insurance agents referred to as the "Agent's Security Compensation Plan." The Agent's Security Compensation Plan consisted of two programs known as the "Deferred Compensation Incentive Credit Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Incentive Credit Plan, Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies. Under the Extended

Earnings Plan, Nationwide agreed to pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months.

The agency agreements also provided that Nationwide's obligation to pay benefits under the Agent's Security Compensation Plan would terminate if a former agent engaged in the fire, casualty, health, or life insurance business, in competition with Nationwide, within one year of the cancellation of the agent's agreement with Nationwide and within a tweny-five mile radius of the former business location of the agent. Nationwide's obligation would also cease if the former agent, at any time after the cancellation of his agency agreement with Nationwide, induced a Nationwide policyholder to cancel an insurance contract with Nationwide. The agency agreements between Nationwide and Darden provided further that either party had the right to cancel the agreement at any time after written notice.

Nationwide exercised its right to terminate the agreement on November 20, 1980. One month following the termination of the agreement, Darden opened a new business as an independent insurance agent, representing various competitors of Nationwide. He operated the new business at the same location he had previously used as a Nationwide agent. Nationwide then notified Darden that it would not pay him any of the benefits to which he otherwise would have been entitled under the Agent's Security Compensation Plan.

The most recent statement which Darden had received prior to his termination indicated that as of December 31, 1979, he had accumulated $28,664.00 in the Deferred Compensation Plan and $65,706.00 in the Extended Earnings Plan. Under the election which Darden had on file with Nationwide at the time of his termination, he was entitled to approximately $490.00 per month for the remainder of his life, to begin within sixty days after his termination, under the Extended Earnings Plan. He was also entitled to approximately $120.00 per month for the remainder of his life, to begin at age 50, under the Deferred Compensation Incentive Plan. At his termination in 1980, he was 46 years of age.

Darden filed the present action on November 8, 1983, seeking to benefit from the terms of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Under ERISA, an employee's right to receive retirement benefits from an employer-sponsored retirement plan must vest, thereby becoming nonforfeitable, after a period of time to be determined according to one of three alternative methods. 29 U.S.C. § 1053(a).[1] Darden based his claim to relief on § 502(a) of the Act, 29 U.S.C. § 1132(a), which provides that a participant in or a beneficiary of an employee retirement income security plan may bring a civil action to enforce the provisions of the Act and to recover benefits due to him. Darden accord-

---

[1] Under the first method, the plan must accord an employee a non-forfeitable right to 100% of his accrued pension benefits upon completion of ten years of service with the employer. 29 U.S.C. § 1053(a)(2)(A). Under the second method, the plan must provide the employee with a nonforfeitable right to a percentage of accrued benefits increasing with each year of service, beginning with 25% of accrued benefits after five years' service and ending with 100% after fifteen years. 29 U.S.C. § 1053(a)(2)(B). Under the third method, the employee's nonforfeitable percentage of accrued benefits increases with respect to both the employee's years of service and his or her age. Fifty percent of the employee's accrued benefits must become nonforfeitable when the employee has completed at least five years of service and the sum of the employee's age and years of service equals or exceeds 45. One hundred percent must become nonforfeitable when the employee has worked for the employer for at least ten years and the sum of the employee's age and years of service equals or exceeds 55. 29 U.S.C. § 1053(a)(2)(C).

Under any of the three alternatives, the Agent's Security Compensation Plan for Darden had vested, immune from forfeiture, if Darden was an employee.

ingly sought to enforce the Act's nonforfeitability requirements and to recover the benefits claimed to be due to him under the provisions of Nationwide's Agent's Security Compensation Plan.

Following discovery, both parties moved for summary judgment. The matter was referred to a magistrate, who recommended that summary judgment be granted for Darden. The district court rejected the magistrate's recommendation and granted summary judgment for Nationwide on the ground that Darden did not qualify as an employee within the scope of ERISA and therefore had no enforceable rights against Nationwide derived from that Act. Darden now appeals from the district court's decision.

II.

To maintain an action based on § 502(a) of ERISA, 29 U.S.C. § 1132(a),[2] Darden must qualify as a "participant" in an employee benefit plan.[3] The Act defines a

[2] Section 502(a) of ERISA, 29 U.S.C. § 1132(a), provides in relevant part:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

[3] While an action may also be brought by a "beneficiary," 29 U.S.C. § 1132(a)(1), (3), or by a "fiduciary," 29 U.S.C. § 1132(a)(3), Darden makes no claim to a right of action in either of those capacities. A "beneficiary," for the purposes of ERISA, is a

"participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . ." 29 U.S.C. § 1002(7). Thus, Darden's right to pursue an ERISA-based claim against Nationwide depends upon whether he may properly be treated as an "employee" for the purposes of ERISA, or whether he falls into the independent contractor category.

The statute itself provides little guidance concerning the interpretation to be given the term "employee" in the ERISA context. "Employee" is defined simply as "any individual employed by an employer." 29 U.S.C. § 1002(6). Perhaps as a result of this lack of explicit statutory guidance, the few courts that have considered the question have looked to definitions of the employer-employee relationship developed in other areas of law.

One such approach involves the application of the traditional common-law standard for indentifying the relationship of master and servant. *See Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Richardson v. Central States Pension Fund*, 645 F.2d 660 (8th Cir. 1981); *Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).[4] The principal element of the common-law stan-

person other than one whose service resulted in the accrual of the benefits, but who is designated as the recipient of benefits accrued through the service of another. 29 U.S.C. § 1002(8). Darden does not claim to be the beneficiary of benefits earned by someone else. Nor is there any indication in the record that Darden had any fiduciary responsibilities with respect to the Nationwide plan.

[4] It is not clear, however, that either the Seventh or Eighth Circuit intended to apply the common-law test to the interpretation of the term "employee" as it is used in the statute itself. Rather, all three of the cases appear to have involved only claims that the plaintiffs were entitled to benefits under the terms of the particular pension plan alone, without raising an additional question as to the validity of the pension plan under ERISA. Accordingly, both courts

dard is the extent of one party's right to direct and control the performance of the other. *Short v. Central States Pension Fund*, 729 F.2d 567, 572 (8th Cir. 1984); *Restatement (Second) of Agency* § 220 (1957); *Prosser and Keeton on Torts*, § 70 at 501 (5th ed. 1984). Many factors are considered in determining whether there is such a right to control, including the degree of one party's supervision of the details of the other's work; whether the two parties are engaged in distinct businesses or occupations; who supplies the place and instrumentalities of the work; the duration of the relationship between the parties; the method of payment; and other factors.[5]

---

interpreted the term "employee" as it was used in the pension plan document, not in the statute. That document, which was the same in all three cases—because all three cases involved the Central States Pension Fund—provided that its terms were to be construed according to Illinois law, and that the common-law definition of the master-servant relationship should control. Thus, in applying common-law principles, the Seventh and Eighth Circuits appear to have been doing no more than giving effect to the intention of the parties to that particular pension plan agreement without considering whether ERISA might preempt or override the intention of the parties.

[5] The District Court for the Western District of Oklahoma took a slightly different approach in *Soloway v. New York Life Insurance Co.*, No. 77-0849-D, slip. op. (W.D. Okla. 1978). Relying on cases which develop the definition of "employee" in the context of other federal statutes, such as the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, rather than on the common law, the district court adopted a six-factor test which is similar in application to the common-law standard. The six factors included: (1) the extent to which the services in question are an integral part of the "employer"'s business; (2) the amount of the "employee"'s investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer"; (4) the "employee"'s opportunities for profit or loss; (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship. Having weighed the matter in that light, the Oklahoma district judge concluded, for the purposes of the case before the court, that the insurance agent concerned was not an employee for ERISA purposes.

Under such traditional common law principles, Darden most probably would not qualify as an employee. Darden was relatively free to run his business as he chose. Dardden was able to exercise his independent judgment as to the time, place and manner of soliciting and selling insurance and serving policy holders. He was able to hire and fire clerical employees without securing Nationwide's approval, though he could not on his own hire additional insurance agents. On the other hand, Nationwide monitored Darden's operations and imposed several restrictions on his activities. He was instructed not to provide price quotations over the telephone to customers. He was also directed to collect a full six months' premium for automobile insurance at the inception of the policy, and was not permitted to allow the customer to pay part of the premium after 45 days. He was required to ask questions of automobile insurance applicants in a manner in line with a certain Nationwide-mandated procedure, to set up a claims log file, to review his files and to contact policy holders 60 days before the renewal date of a policy, to have his secretaries attend training sessions sponsored by Nationwide, to inspect personally the automobiles of applicants for automobile insurance, and to meet personally with every youthful male applicant for automobile insurance. While Darden was not required to prepare regular reports for Nationwide concerning his activities, he was subject to unannounced audits by Nationwide's accountants. Nationwide encouraged Darden, but did not compel him, to attend training seminars offered by Nationwide.

Darden was compensated through commissions, rather than through a salary. He paid his business expenses out of his commissions, including office maintenance and utilities and the salaries of his clerical staff. Darden owned the building housing his agency's offices and the furniture used there, as well as an automobile maintained for business purposes. He did not, however, own his business in a complete sense, because he was not entitled to

sell the business as a going concern. Under the terms of the agency agreements between Darden and Nationwide, the good will and the value associated with the servicing of existing policies reverted to Nationwide upon the termination of the agency relationship. In their dealings with each other, Darden and Nationwide referred to their relationship as one between independent contractors. Darden was not entitled to receive certain benefits reserved for Nationwide "employees," such as life insurance, health insurance, and paid annual leave. Darden received his commissions without deduction by Nationwide for income taxes or other charges.

We conclude, however, that the common-law test for the relationship of master and servant is not the appropriate standard for application here. The Supreme Court has emphasized on two occasions that the definition of "employee" should be tailored to the purposes of the statute being construed. *United States v. Silk*, 331 U.S. 704, 713 (1947) (defining "employee" for the purposes of the Social Security Act); *NLRB v. Hearst Publications*, 322 U.S. 111, 120-29 (1944) (defining "employee" for the purposes of the National Labor Relations Act). In both cases, the Court rejected the argument that the term "employee" as used in federal statutes should be interpreted in accordance with the common-law standard. The Court pointed out that the common-law test, which emphasizes the elements of supervision and control, was developed for the purpose of determining whether the extent of one person's control over the actions of another was sufficient to justify the imposition of vicarious liability on the controlling person for the wrongful acts of the person subject to control. *Silk*, 331 U.S. at 713; *Hearst*, 322 U.S. at 129. Instead, the Court explained, the content of the term "employee" in the context of a particular federal statute is "to be construed 'in the light of the mischief to be corrected and the end to be attained.'" *Silk*, 331 U.S. at 713, *quoting Hearst*, 322 U.S.

at 124. In interpreting statutory language so as to define the class of persons protected by the statute, a court must take as its "primary consideration" whether the inclusion of the disputed category of persons would effectuate the "declared policy and purposes" of the statute. *Silk*, 331 U.S. at 713; *Hearst*, 322 U.S. at 131-32.

The purposes of ERISA are explicitly set forth in § 2 of the Act, 29 U.S.C. § 1001. Congress was concerned that "many employees with long years of employment are losing anticipated retirement benefits." Because employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," Congress felt that it was desirable in the interests of the free flow of commerce, as well as in the interests of individual employees and their beneficiaries, to enact minimum standards "assuring the equitable character of such plans and their financial soundness."

This statement of congressional purpose provides us with useful guidance in fashioning a standard to be used in determining whether an individual who does not fit within the traditional concept of employee status should nonetheless be considered an employee in the context of ERISA. The protected class described in the statement of purpose encompasses, first of all, persons whose retirement benefits were "anticipated." In other words, the "employer" or sponsor of the pension plan must have taken some action that created a reasonable expectation on the "employees'" part that benefits would be paid to them in the future. Second, persons within the protected class must have relied on that expectation by remaining for "long years," or a substantial period of time, in the "employer's" service, and by foregoing other significant means of providing for their retirement. It is that category of persons—those for whom the forfeiture of accrued employee benefits results in financial hardship during retirement—that was the focus of congres-

sional concern. Finally, implicit in the congressional statement of purpose is the recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits. Had they possessed such bargaining power, statutory reform would have been unnecessary.[6] Evidence of the extent of the "employer's" control may, of course, be relevant to a determination of relative bargaining power.

Viewed from that perspective, Darden's case appears substantially stronger. By establishing a comprehensive retirement benefits program for its insurance agents, Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him.[7] There is also evidence in the record indicating Darden's reliance on that expectation. He remained with Nationwide for eighteen years—a period which exceeds the length of service prescribed by Congress for the vesting of benefits under any of the three methods described in § 1053(a). Moreover, Darden was obliged to forego at least one alternative method of providing for his retire-

[6] The importance of a disparity in economic bargaining power to a determination of employee status was recognized in *Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*, No. 83-129-CIV-5, slip op. at 15-17 (E.D.N.C. 1984), where the district court held that certain insurance agents qualified as "employees" for the purposes of ERISA.

[7] Darden's expectations were limited, of course, by the agency agreement's provision, present from the outset, that accrued benefits would be forfeited if Darden were to compete with Nationwide following the termination of his agency relationship. However, it is precisely that sort of employer-imposed condition on the employee's anticipations that Congress intended to outlaw with the enactment of ERISA. Under ERISA, employee rights must vest after a statutorily defined period; they may no longer remain contingent on the employee's actions. Employers may not circumvent that congressional purpose by arguing that a disappointed beneficiary did not qualify as an employee because his or her expectations were limited by forfeitability provisions.

ment that would normally have been available to an independent contractor: because much of the value of a Nationwide agency reverted to Nationwide upon the agent's termination, Darden was not able to build up equity in his business which could eventually be transformed into cash through the sale of the business. On the other hand, there is no indication in the record as to whether Darden pursued other methods of providing for his retirement which would have significantly reduced his reliance on the Nationwide benefit plan. Nor is there any evidence as to whether a failure to make such alternative provisions would have been reasonable in light of the common practices of other Nationwide insurance agents. Finally, the evidence concerning the respective bargaining strength of the parties is incomplete.

It appears that the parties have oriented their factual presentations toward the common-law test of master and servant, a standard which we now reject in favor of one focusing on the objectives and purposes of ERISA. Applying the approach we now endorse, we are not satisfied that the facts have been sufficiently developed to insure ripeness for decision at the summary judgment stage. Further factual development relevant to the purposes of ERISA, either by additional materials submitted in support of a renewed motion for summary judgment, or by trial, would be appropriate. We conclude that the district court's focus of attention on the common law master/servant issue did not result in a decision properly attuned to the pertinent considerations.

III.

Nationwide further contends that, even if Darden is assumed to be an employee for the purposes of ERISA, the district court's judgment may, nevertheless, be upheld on other grounds. Nationwide points out that the nonforfeitability requirements of 29 U.S.C. § 1053(a) apply only to "pension plans" and not to other forms of employee

benefit plans. Thus, Nationwide's provision for forfeiture upon a terminated agent's entry into competition with Nationwide is invalid only if Nationwide's Agent's Security Compensation Plan qualified as a "pension plan" within the meaning of the Act. Nationwide advances two theories in support of its argument that its plan did not so qualify.

Nationwide argues, first, that its plan constituted a "severance pay plan." Regulations issued by the Secretary of Labor, pursuant to statutory authority under 29 U.S.C. § 1002(2)(B), provide that a severance pay plan does not qualify as a pension plan for purposes of ERISA if: (1) the severance payments are not contingent upon the employee's retirement; (2) the total amount of severance payment does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and (3) all such payments to any employee are completed within 24 months after the termination of the employee's service. 29 C.F.R. § 2510.3-2. Nationwide's Agent's Security Compensation Plan plainly fails to satisfy the third prong of that test. Under the terms of the plan, Darden was entitled to, and indeed did, elect to receive benefits in the form of a life annuity. Moreover, under the Deferred Compensation Incentive Credit portion of the plan, Darden's benefit payments would begin only when he reached the age of 50—four years after his termination at age 46. Thus, it is manifest that Nationwide's plan did not provide for the completion of payments to Darden within 24 months following his termination.

Nationwide also contends that its plan is not subject to the vesting and nonforfeitability requirements of § 1053(a) by virtue of § 1051(2), which exempts from those requirements any plan "which is unfunded and which is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of

management or highly compensated employees."[8] In the present posture of the case, however, whatever the ultimate disposition may be, the question is not suited for summary judgment disposition, because several disputed issues of fact remain.

First, the parties disagree as to whether Nationwide's plan is funded or unfunded, and both parties have produced evidence to support their respective positions. Nationwide relies on the affidavit of George W. Frink, Nationwide's Vice President for Marketing Services, who has stated that the plan is unfunded. Darden, on the contrary, points to the agents' benefit handbook prepared by Nationwide, which stated that the Deferred Compensation Incentive Credit portion of the plan was funded as benefits accrue, although the Extended Earnings portion of the plan would be funded only upon cancellation of the agent's contract. Darden also points to the deposition of Elton Parker, the personnel director of Nationwide's Raleigh office, who stated that both portions of the plan were funded.

The facts are also in dispute as to whether the Agents' Security Compensation Plan was limited to a "select group" of "highly compensated employees." The term "select group" seems to imply a small percentage of the total number. In *Belka v. Rowe Furniture Corp.*, 571 F. Supp. 1249, 1252 (D. Md. 1983), the district court held that a plan which covered only 4.6% of total employees was limited to a "select group." Here, the parties have presented no evidence as to the percentage of Nationwide's total employee complement who participated in the Agents' Security Compensation Plan.

---

[8] We do not accept Darden's contention that our consideration of the argument is improper because the issue was not raised before the magistrate. The argument was sufficiently advanced when it was raised before the district court in Nationwide's Objection to the Magistrate's Memorandum and Recommendations.

There is also a dearth of evidence as to whether the insurance agents covered by the plan were "highly compensated" in relation to Nationwide's other employees. Nationwide asserts, but has not substantiated, that the average compensation of its agents in 1980 was $44,773, while the average compensation of "all Nationwide employees" in 1980 was $16,510. Even assuming the correctness of those figures, however, a lack of further clarification prevents their intelligent evaluation. We are not told, for example, whether the $16,510 figure is the average of all employees *including* the agents or *excluding* the agents. Nor are we told how the agents' compensation is calculated, or whether it is adjusted so as to be comparable to the compensation paid to salaried employees. Nationwide's comparison may be between apples and oranges. It is clear, then, that disposition by way of summary judgment of the question of exemption under § 1051(2) would be inappropriate.

IV.

We vacate, rather than reverse, the district court's decision, so that on remand the parties may have an opportunity to structure their factual and legal presentations concerning Darden's status as an employee within the meaning of ERISA in a manner consistent with the approach we have outlined above. Alternatively, or if Darden is found to qualify as an employee, the district court should allow the parites to present further evidence on the question whether Nationwide's plan constituted an unfunded plan for the compensation of a select group of highly compensated employees.

VACATED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

ROBERT T. DARDEN,
Plaintiff,

vs.

NATIONWIDE MUTUAL INS. CO., *et al.*,
Defendants.

ORDER

[Filed May 23, 1985]

This action comes before the court upon cross-motions for summary judgment filed by the parties and upon the memorandum and recommendation of the Honorable Charles K. McCotter, Jr., United States Magistrate entered in this action on March 8, 1985. The defendants have filed objections to the magistrate's memorandum and recommendation and this cause is now ready for an order of the court.

FACTS

Plaintiff Robert T. Darden is a former insurance agent for the defendant insurance companies. Darden seeks to recover certain monetary benefits which he alleges are due to him under the programs maintained by the defendant and known as "deferred compensation incentive credits" and "extended earnings." Darden maintains that the provisions of the Employment Retirement Income

Security Act (ERISA), 49 U.S.C. § 1001, *et seq.*, apply to these programs and that his interests in the programs were non-forfeitable. The defendants contend that ERISA does not apply to these programs because Darden was not an employee, but an independent contractor.

From 1962 until November 20, 1980, Darden was a non-salaried insurance agent for Nationwide. The relationship between the parties was governed by a series of written contracts called agent's agreements. The agent's agreement provided that the liability of Nationwide for benefits under the agent's security compensation plan would cease if (1) the agent engaged in the fire, casualty, life, or health insurance business within one year of the cancellation of the agent's agreement within twenty-five miles radius of the former business location, (2) the agent at any time after the cancellation of the agreement induced a policyholder of Nationwide to cancel or (3) the agent replaced any insurance contract in force with Nationwide or furnished the name of the policyholder to a competitor.

In October, 1980, Nationwide terminated Darden's agreement because he became a marginal agent and was causing the company to suffer losses. In December, 1980, Darden began an insurance business at the same location selling policies for Nationwide's competitors. Nationwide cancelled Darden's benefits under the agent's security compensation plan.

DISCUSSION

To prevail under an ERISA theory, the plaintiff must show that he was an employee of the defendants rather than an independent contractor. For the following reasons, the court finds that the plaintiff was not an employee.

The plaintiff maintained an office in Spring Lake, North Carolina, at his own expense. The plaintiff was free to

solicit insurance sales wherever, whenever, and from whomever he wished. The plaintiff was free to hire and fire his office help. The plaintiff paid his own business expenses. The plaintiff received compensation solely through commissions rather than as a salary from the defendants. The plaintiff was ineligible for such employee benefits as accident and health insurance, sick leave, vacation pay, jury duty pay, and employee pension or profit sharing plans. Nationwide withheld no taxes from the plaintiff's commissions. The plaintiff reported his own income, and paid taxes as an independent businessman. The plaintiff reported his commission income and business expenses on IRS forms prescribed for sole proprietorships. The plaintiff maintained an individual retirement account. Throughout all the agreements between the plaintiff and Nationwide, the plaintiff is listed as an independent contractor and not an employee. The plaintiff paid the fees for all his state agent's licenses. The plaintiff was free to incorporate his agency. He determined his own hours. Finally, it was primarily through the plaintiff's own efforts, ingenuity, and good business sense that he made money, and not through any employment relationship with Nationwide.

The plaintiff alleges against this array of facts that the defendants had the right to control the plaintiff because they made suggestions in order to make the plaintiff's business more profitable. The defendant conducted seminars for the plaintiff and for his clerical employees to teach them how to do their jobs more efficiently. Neither the plaintiff nor his employees were required to attend these seminars, and the plaintiff was not required to incorporate the suggestions that the defendants made.

In *U.S. v. Silk*, 331 U.S. 704 (1947), the Supreme Court decided that truck drivers were not employees for purposes of the Social Security Act. The court considered the following factors: (1) degree of control over the workers; (2) the opportunity for the worker for profit

or loss from his own efforts; (3) the investment by the workers in equipment; (4) the permanency of the relationship; and (5) the skill required of the workers to carry out their duties. The Court found that the truckers were free to hire their own assistants, they were free to determine their own routes, they were compensated with a percentage of the traiffs charged by the company, their opportunity for profit or loss depended on their own efforts and initiative, and the contracts between the company and the truckers could be cancelled by either party.

The Supreme Court in *NLRB v. United Insurance Company*, 390 U.S. 254, 19 L.Ed.2d 1083, 88 S.Ct. 988 (1968) stated the correct method for determining whether a person was an employee or an independent contractor.

> In such a situation as this there can be no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in the light of the pertinent common law agency principles.

"The total factual context" of Mr. Darden's relationship with Nationwide shows that he was an independent contractor and not an employee. *See Wardle v. Pension Fund*, 627 F.2d 820 (7th Cir. 1980) and *Carter v. Pension Plan*, 656 F.2d 575 (10th Cir. 1981).

Because this court determines that Darden was an independent contractor and not an employee of Nationwide, it need not reach the other issues discussed in the magistrate's memorandum and recommendation. The defendant's motion for summary judgment is ALLOWED this 22nd day of May, 1985.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2759

ROBERT T. DARDEN,
Plaintiff-Appellee
v.
NATIONWIDE MUTUAL INSURANCE COMPANY;
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY;
NATIONWIDE LIFE INSURANCE COMPANY,
Defendants-Appellants

No. 89-2760

ROBERT T. DARDEN,
Plaintiff-Appellant
v.
NATIONWIDE MUTUAL INSURANCE COMPANY;
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY;
NATIONWIDE LIFE INSURANCE COMPANY,
Defendants-Appellees

On Petition for Rehearing with
Suggestion for Rehearing In Banc

[Filed February 22, 1991]

The appellant/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to

this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Hall and Judge Murnaghan.

For the Court,
/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1623

ROBERT D. DARDEN,
Appellant,

versus

NATIONWIDE MUTUAL INSURANCE COMPANY, *et al.*,
Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Fayetteville
Terernce W. Boyle, District Judge

[Filed Aug. 28, 1986]

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Sprouse.

For the Court,
/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-4016

A.F. PLAZZO; PLAZZO INSURANCE SERVICES, INC.,
Plaintiffs-Appellees,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
Defendant-Appellant,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, *et al.*,
Defendants.

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed Dec. 22, 1989

Before: KEITH and BOGGS, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. Defendant-appellant Nationwide Mutual Insurance Company appeals from the judgment of the district court holding that plaintiff-appellee, A.F. Plazzo, was an employee of Nationwide for the purposes of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (ERISA). In keeping with this court's recent decision in *Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245 (6th Cir. 1989), which held that a commissioned insurance agent was an independent

contractor, not an employee for ERISA purposes, we reverse the judgment of the district court.

FACTS

Between 1961 and 1983, A.F. Plazzo was an unsalaried insurance agent for Nationwide. Plazzo's relationship with Nationwide was governed by a series of agency agreements. Under the agreements, Plazzo was required to represent Nationwide exclusively. These agreements specifically stated that Plazzo was an independent contractor. As such, he was responsible for maintaining his own business, including providing his own office space and hiring his own employees. Nationwide paid Plazzo commission which was reported on IRS Form 1099 Self-Employment Statement. Plazzo prospered as a Nationwide agent. In 1980, he built his own office building and took his son into his business. In 1982, Plazzo formed a corporation, Plazzo Insurance Services, Inc. (PISI). As the principal for PISI, he arranged with Nationwide to terminate his agent's agreement in favor of a corporate agency agreement for PISI. In October 1983, Plazzo sued Nationwide in state court for the alleged breach of an oral contract to assign certain insurance policies to the Plazzo agency. Summary judgment was granted to Nationwide on this claim. In part due to this suit, Nationwide cancelled the agency agreement with PISI in December 1983.

Nationwide alleges that following cancellation of the agreement, the younger Plazzo, with his father's assistance, continued to sell insurance for other insurance companies from the same office they used while selling Nationwide insurance. In January 1984, PISI sent letters to many Nationwide policyholders previously serviced by the Plazzos, notifying them that PISI was an independent insurance agency and expressing a desire to retain their business. The Plazzos were very successful in switching Nationwide policyholders to their new lines of insurance.

The present dispute involves Plazzo's claim that Nationwide has withheld retirement benefits due him in violation of ERISA. Under the agency agreement, the Agent's Security Compensation Plan (ASCP) conditionally provided payments to agents following the cancellation of the agreement. The ASCP consisted of two parts, Extended Earnings and Deferred Compensation Incentive Credits (DCIC). Extended Earnings provided the agent with an amount equal to renewal commissions earned in the last twelve months of service upon his retirement, termination, disability, or death. Under DCIC, after the fifth year of service, the agent received credit annually for a percentage of earnings on renewals and new policies on cerain types of insurance. To receive the ASCP payments, however, the agent could not directly or indirectly engage in the insurance business within a 25-mile radius of his Nationwide location during the first year following cancellation of the agreement or directly or indirectly induce Nationwide policyholders to cancel or replace their coverage. Due to the Plazzos' sale of other insurance lines and their efforts to induce Nationwide policyholders to change their policies to these new lines, Nationwide determined that Plazzo had failed to meet the conditions for ASCP payments. Plazzo filed suit under § 502(a) of ERISA which provides, *inter alia*, that a participant in an employee retirement plan may bring a civil action to enforce his rights under the plan or recover benefits under the plan. 29 USC § 1132(a)(1)(B). Plazzo argued that under the vesting provisions of ERISA, Nationwide cannot enforce the conditions for ASCP payments against him. The district court ruled in Plazzo's favor, and Nationwide appealed.

ANALYSIS

ERISA's vesting provisions, 29 USC § 1053, are only applicable if: 1) Plazzo was an "employee" within the meaning of ERISA; 2) the ASCP is a "pension benefit

plan" within the meaning of ERISA; and 3) the ASCP is not a "top hat plan" exempted from ERISA's vesting requirements. *Wolcott v. Nationwide Mutual Insurance*, 884 F.2d 245, 250 (6th Cir. 1989); *see* 29 U.S.C. §§ 1132(a), 1002(2)(A), 1002(6), 1002(7), 1051(2). Unfortunately, ERISA's definition of "employee" is not enlightening. "Employee" is defined only as "any individual employed by an employer." 29 USC 1002(6). In *Wolcott, supra*, this court ruled that the common law rules of agency should be used in determining whether an individual is an employee for ERISA purposes. The criteria to be considered include:

> 1) the degree of control and supervision over the manner in which the work is performed; 2) whether or not the "employee" is engaged in his own business; 3) the company's right to hire and discharge the persons doing the work; 4) the method of compensation to the "employee"; 5) whether the "employee" receives the same benefits as the company's regular employees; 6) who has control of the premises where the work is done; 7) how the parties structure their Social Security and income relations; 8) whether the "employee" stands to make a profit on the work of those working for him; 9) the amount of the "employee's" investment in facilities and equipment; 10) the belief of the parties as to their business relationship; 11) the amount of skill required in the particular occupation; and 12) the duration of time for which the "employee" is employed. (Citations omitted).

Wolcott, 884 F.2d at 251. *See* Restatement (Second) of Agency § 220(2) (1958). Although the district court applied similar common law criteria, in light of *Wolcott* we cannot agree with its finding that Plazzo was an employee of Nationwide for the purposes of ERISA.

The facts of *Wolcott* are very similar to this case. Wolcott was a commissioned agent with Nationwide for

twenty years. A dispute arose because Wolcott's wife and daughter sold competing lines of insurance from Wolcott's office. Nationwide cancelled Wolcott's agency agreement. After cancellation, Wolcott joined his wife and daughter in selling the other lines of insurance from the same office he used to sell Nationwide insurance. Due to these events, Nationwide refused to distribute Wolcott's ASCP payments because he had violated the noncompetition clause of the agency agreement. Wolcott sued alleging a violation of ERISA. The district court granted summary judgment for Wolcott. This court reversed, holding that Wolcott was an independent contractor rather than an employee of Nationwide, and therefore was not entitled to ERISA's vesting protections. In making its determination, this court noted that Wolcott owned his own office condominium, exercised managerial skill in his business, hired his own employees, paid most of his expenses, and maintained his own Keogh retirement plan. Additionally, Wolcott was paid commission, reported to the IRS that he was self-employed, and was not eligible for regular employee benefits such as vacation or sick leave.

The facts of the present case are virtually indistinguishable from *Wolcott*. Plazzo owned and maintained his own office building. He exercised managerial skill in operating his business. He hired, paid, and established a health insurance plan for his employees. He maintained bank accounts to pay the monthly expenses of operating his business. He was paid on a commission basis and reported to the IRS that he was self-employed. He maintained his own Keogh retirement plan. Thus, we conclude that Plazzo, like Wolcott, was an independent contractor, not an employee for the purposes of ERISA. Accordingly, the judgment of the district court is reversed.

ISSUED AS MANDATE: February 27, 1990
COSTS: None

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 87-2815-4A

JOE S. SCIARA,

vs. *Plaintiff*,

NATIONWIDE INSURANCE COMPANIES,
Defendant.

No. 88-2490-4A

CHARLES B. BUCKNER,

vs. *Plaintiff*,

NATIONWIDE INSURANCE COMPANIES,
Defendant.

ORDER ON PENDING MOTIONS FOR SUMMARY JUDGMENT

[Filed Mar. 30, 1990]

In these cases, Joe S. Sciara ("Sciara") and Charles B. Buckner ("Buckner") brought separate actions against their former employer Nationwide Insurance Companies ("Nationwide"). By an order dated December 13, 1988, the cases were consolidated for trial. Both plaintiffs have sought to recover certain pension benefits allegedly owed to them by Nationwide. Both plaintiffs request relief under the Employee Retirement Income Securty Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and under

breach of contract theories. Nationwide has counterclaimed against each plaintiff alleging that it was damaged by each plaintiff's breach of their employment contract. Presently before the Court are motions for summary judgment by Nationwide, (1) on the ERISA claims of both Buckner and Sciara, (2) on its counterclaim against both Buckner and Sciara, and (3) on Sciara's state law breach of contract claim.[1] Also pending is Buckner's motion to dismiss Nationwide's counterclaim. Those motions are addressed below.

Background

Both Sciara and Buckner were commissioned insurance agents for Nationwide. Each began work for the company in the early 1960's. Their relationships with Nationwide were governed by written contracts known as "Agents' Agreements" which were renewed and revised over the years. The last renewal was signed by the parties in January 1983. These Agents' Agreements included terms and conditions of an Agents Security Compensation Plan ("ASCP"). The ASCP consisted of two programs, the "Deferred Compensation Incentive Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Plan, Nationwide was to maintain a retirement account for Buckner and Sciara and annually credit to that account a sum based on each agent's service fee earnings from the insurance policies sold or renewed. Under the Extended Earnings Plan, Nationwide was to pay each agent, upon retirement, termination, or death a sum equal to his earnings from renewal fees over the previous twelve months.

A former agent was not entitled to the ASCP benefits unless the cancellation of his agreement was a "qualified

[1] This Court has previously dismissed the breach of contract claim by Buckner because it was barred by the statute of limitations. *See Buckner v. Nationwide Ins. Co.*, No. 88-2490 (W.D. Tenn. July 7, 1989) (Order on Motion to Dismiss).

cancellation," which was defined in the Agents' Agreement as follows:

> A qualified cancellation "is any cancellation of the agreement unless the agent has [prior to cancellation] induced or attempted to induce—either directly or indirectly—any policy holder to lapse, cancel, or replace any insurance in force with the companies" [Nationwide]. See Agents' Agreement paragraph 11(e).

Even if the cancellation of an Agent's Agreement was "qualified," Nationwide's obligation to pay the ASCP benefits would terminate if any of the following occurred:

> 1) The agent, after cancellation, engaged in competition with Nationwide within a twenty-five mile radius of his former business location prior to the lapse of one (1) year after the cancellation;
>
> 2) The agent at any time after the cancellation of the Agreement induced a Nationwide policy holder to lapse, cancel or replace a contract of insurance with Nationwide; or
>
> 3) The agent failed to return all materials and records to Nationwide within ten days after the cancellation.

The Agents' Agreements provided that either party had the right to cancel the agreement at any time after written notice. Buckner's contract was cancelled May 17, 1983, and Sciara's contract was cancelled June 2, 1983. Although the agreement could be cancelled without cause, Nationwide has contended in this suit, that both Buckner and Sciara were terminated because they sold insurance for other companies without express written approval by Nationwide.

After receiving notice of their termination, both plaintiffs made demands for their ASCP benefits. Nationwide refused to pay, asserting that the agents had forfeited

their ASCP benefits by engaging in competition with Nationwide within one year after the cancellation. *See* Agents' Agreement paragraph 11*f*(1). Sciara then filed suit in Tennessee state court in October 1984 against Nationwide, alleging breach of the Agent's Agreement. Sciara later amended his complaint to add a cause of action under ERISA. Sciara's action was removed to this Court in November 1987. Buckner waited until July 1988 to file suit against Nationwide. Like Sciara, he alleged that Nationwide had breached the Agent's Agreement and asserted an ERISA claim. As heretofore indicated, this Court dismissed Buckner's breach of contract claim because it was barred by the statute of limitations.

The ERISA Claims

Both Sciara and Buckner have sought relief pursuant to ERISA, 29 U.S.C. § 1001 *et seq.*, alleging that Nationwide may not enforce the conditions on the ASCP payments because they have "vested" under ERISA and thus are nonforfeitable. *See* 29 U.S.C. § 1053. The nonforfeiture provisions of 29 U.S.C. § 1053 are only applicable if (1) Sciara and Buckner are employees within the meaning of ERISA; (2) the ASCP is a "pension benefit plan" within the meaning of ERISA; and (3) the ASCP is not a "top hat plan," which is exempted from ERISA's vesting requirements. 29 U.S.C. §§ 1132(a), 1002(2)(a), 1002(b) and 1002(7); *see also Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*, 801 F.2d 675, 676-78 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1375 (1987). The parties concede that the ASCP involved in the present case is a "pension benefit plan" under ERISA. However, Nationwide argues that Sciara and Buckner are not "participants in an employee benefit plan" because they are independent contractors rather than "employees" of Nationwide. *See* 29 U.S.C. §§ 1132(a), 1002(7), and 1002(6). The Court of Appeals for the Sixth Circuit has recently addressed the factors a court should consider

when deciding whether a party is an employee or independent contractor for ERISA purposes. In *Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245 (6th Cir. 1989), the court held that a commissioned insurance agent was an independent contractor rather than an employee under ERISA. The *Wolcott* court stated that the courts should look to common-law rules of agency to determine "employee" status. *Id.* at 251.

> The traditional common-law criteria that courts have employed include: (1) the degree of control and supervision over the manner in which the work is performed; (2) whether or not the "employee" is engaged in his own business; (3) the company's right to hire and discharge the persons doing the work; (4) the method of compensation to the "employee"; (5) whether the "employee" receives the same benefits as the company's regular employees; (6) who has control of the premises where the work is done; (7) how the parties structure their Social Security and income relations; (8) whether the "employee" stands to make a profit on the work of those working for him; (9) the amount of the "employee's" investment in the facilities and equipment; (10) the belief of the parties as to their business relationship; (11) the amount of skill required in the particular occupation; and (12) the duration of time for which the "employee" is employed.

Id.; *see also Holt v. Winspirsiger*, 811 F.2d 1532, 1539-40 (D.C. Cir. 1987) (citing Restatement (Second) of Agency § 220(2) (1958)).

Applying these factors to the present case, the Court finds that Sciara and Buckner are not "employees" within the meaning of ERISA and cannot invoke ERISA's nonforfeiture provisions. Both Sciara and Buckner had their own offices, paid their own expenses and insurance, and employed and supervised their own employees. These ac-

tions were not controlled by Nationwide. Likewise, Nationwide did not deduct Social Security or income taxes from their commissions. Moreover, the Agents' Agreements which governed their relationships with Nationwide stated that they were independent contractors. Therefore, Nationwide's motion for summary judgment on the ERISA claims in both cases is granted.

The Breach of Contract Claim of Sciara

Sciara's breach of contract claim involves two separate issues. First, whether Nationwide could terminate Sciara without breaching the Agents' Agreement and second, whether Nationwide breached the Agent's Agreement when it refused to pay Sciara his ASCP benefits. The first question is governed by the plain terms of the Agent's Agreement. Paragraph 9 states "that due to the personal nature of our [Nationwide's and Sciara's] relationship, you [Sciara] or the companies [Nationwide] have the right to cancel this agreement at any time after written notice has been delivered to the other or mailed to the other's last known address." All Nationwide was required to do in order to terminate Sciara was send him written notice of that cancellation, which was done. No matter what reasons Nationwide may have had to cancelling Sciara's agreement, it did not breach the agreement by terminating it.

However, the question of whether Nationwide could withhold Sciara's ASCP benefits after cancellation is much more involved. In order to have a right to the ASCP benefits, Sciara's cancellation had to have been a "qualified cancellation." Even if Sciara "qualified" for the ASCP benefits, Nationwide's obligation to pay them could still be terminated if Sciara violated either of paragraph 11(f)'s post-cancellation restrictions.

When Sciara made demand for the ASCP benefits, Nationwide refused because it asserted that Sciara's cancellation was not qualified and that he had violated paragraph 11(f)(1) of the Agent's Agreement by competing with Nationwide for customers prior to the lapse of one year. Nationwide's motion for summary judgment reiterates those two arguments.

Sciara's filed deposition contains an admission by him that he switched Nationwide's former policy holders to other companies in the three months prior to the cancellation of his agreement. This action would prevent the cancellation from being a "qualified cancellation" as defined in paragraph 11(e) of the Agent's Agreement. Furthermore, it appears that Sciara violated paragraph 11(f)'s post-cancellation restrictions. Sciara's deposition also contains an admission that in the first six months after his cancellation, his clientele was 80% ex-Nationwide policy holders. Also, he admitted that he moved to a new office within four miles of his previous business. These actions clearly violate paragraph 11(f)(1)'s restrictions on competition within one year after cancellation.

In response, Sciara argues that paragraph 11(f)(1)'s "covenant not to compete" is void for lack of consideration and contrary to Tennessee public policy. Therefore he posits that it should not be enforced to deny him the ASCP benefits.

Although the record suggests that Sciara did not qualify for the ASCP benefits, this Court finds that even if he had qualified, Nationwide was not obligated to pay the ASCP benefits because Sciara violated a "covenant not to compete" which neither lacks consideration nor is void against public policy.

The covenant not to compete in the present case was a part of the original Agent's Agreement, which was signed by the parties in a "bargained for exchange." *See Central Adjustment Bureau v. Ingram*, 678 S.W.2d 28 (Tenn. 1984). In consideration for Sciara's not competing with Nationwide after cancellation, Nationwide agreed

to pay him ASCP benefits. This is sufficient consideration to support the covenant. *Id.* Also under *Ingram*, it appears that Sciara's continued employment from the January signing until June would be sufficient consideration to support the covenant. *See also Ramsey v. Mutual Supply Company*, 58 Tenn. App. 164, 427 S.W.2d 849 (1968).

As to the question of whether the "covenant not to compete" violates Tennessee public policy, this Court concludes that it does not. As a general rule, restrictive covenants in employment contracts will be enforced if they are reasonable under the particular circumstances. *See Allright Auto Parts, Inc. v. Berry*, 219 Tenn. 280, 409 S.W.2d 361 (1966). Reasonableness depends on the time and territorial limits involved. "The limits must be no greater than is necessary to protect the business interests of the employer." *Id.* at 363. In the present case, the limits on time and territory are reasonable.

Therefore because the Court finds that paragraph 11 (f) (1)'s covenant not to compete is valid and enforceable, and plaintiff has admittedly violated the covenant, Nationwide was not required to pay Sciara the ASCP benefits. Nationwide's motion for summary judgment on Sciara's breach of contract claim is hereby granted.

Nationwide's Counterclaims

Nationwide has moved for summary judgment on its counterclaims which allege that both Buckner and Sciara breached the Agents' Agreements by writing insurance for other companies. Buckner has responded to Nationwide's motion with a motion to dismiss the counterclaim against him. Buckner's motion is hereby granted. This Court's July 7, 1989 order concluded that Buckner's breach of contract claims were barred by the statute of limitations. Nationwide's counterclaim against Buckner fails for the same reason.

Sciara argues that Nationwide should be estopped from enforcing the exclusive representation provision of the contract, because it had allowed agents to write insurance for other companies without obtaining Nationwide's consent. The record supports Sciara's argument. Nationwide had routinely allowed Sciara to write insurance for other companies, and it would be inequitable to allow Nationwide to invoke this provision in a damage suit when it had routinely allowed noncompliance by its agents. Therefore the Court concludes that Nationwide is estopped from enforcing the exclusive representation clause, and its motion for summary judgment is denied.

Conclusion

Nationwide's motion for summary judgment on the ERISA claims by Buckner and Sciara is granted. The clerk is instructed to enter a judgment in favor of Nationwide on the ERISA claims in both cases. Nationwide's motion for summary judgment on Sciara's breach of contract claim is granted. The clerk is instructed to enter a judgment in favor of Nationwide on Sciara's breach of contract claim. Nationwide's motion for summary judgment on its counterclaims against Buckner and Sciara is denied. Buckner's motion to dismiss Nationwide's counterclaim is granted. The clerk is instructed to enter a judgment in favor of Buckner on Nationwide's counterclaim. The Court, sua sponte, dismisses Nationwide's counterclaim against Sciara. The clerk is instructed to enter a judgment in favor of Sciara on Nationwide's counterclaim. All issues having been resolved, the clerk is instructed to enter Final Judgments dismissing all claims and counterclaims in both cases.

IT IS SO ORDERED.

ENTER: This 30th day of March, 1990.

/s/ Robert M. McRae
ROBERT M. MCRAE
Senior United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil N-84-503(JAC)

JONATHAN HARLOW, *et al.*,
Plaintiffs,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY, *et al.*,
Defendants.

June 19, 1987
New Haven, Connecticut

Before: HON. JOSE A. CABRANES, U.S.D.J.

RULING OF THE COURT

Appearances:

For the Plaintiffs:

HOWARD C. ECKENRODE, ESQ.
87 River Street
Milford, Connecticut 06460

For the Defendants:

DEBROAH S. FREEMAN, ESQ.
Skelley, Clifford, Vinkels, Williams &
Rottner, P.C.
12 Charter Oak Place
Hartford, Connecticut 06106

THE COURT: Upon review of the entire record of this case, including the facts as previously stated and clarified, as well as the arguments of counsel here today, I am prepared to rule on the pending motions.

Summary judgment "is properly regarded, not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2555 (1986). In order to grant a motion for summary judgment, the court must find that there is no "genuine issue of material fact" and that "the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

In determining whether there is a material issue of fact, the court must "resolve all ambiguities and draw all inferences against the moving party." Schwabenbauer v. Board of Education, 667 F.2d 305, 313 (2d Circuit 1981). However, the party opposing summary judgment "may not rest upon mere conclusory allegations or denials as a vehicle for obtaining a trial," but instead "must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful." Quinn v. Syracuse Model Neighborhood Corporation, 613 F.2d 438, 445 (2d Circuit 1980), quoting SEC v. Research Automation Corporation, 585 F.2d 31, 33 (2d Circuit 1978).

At argument here today, plaintiff acknowledged that he is not opposing defendants' motion for summary judgment directed at plaintiff's wrongful termination claim, Count One of the complaint, and this court has already granted defendant's motion for summary judgment as to that count.

In support of his contention that he was an "employee" for ERISA purposes, plaintiff urges that the court adopt the test for that status adopted by the Court of Appeals for the Fourth Circuit in Darden v. Nationwide Mutual Insurance Co., 796 F.2d 701 (4th Circuit 1986). De-

fendant Nationwide counters that the Darden court erred in its analysis by only considering legislative purpose in arriving at its standard. In its place, Nationwide argues for a "hybrid test" that takes into account the economic realities that created the need for remedial legislation, but also considers traditional common law principles definding the employer-employee relationship. Nationwide contends that a such a hybrid test more accurately reflects Supreme Court precedent, congressional intent, and the actual practice of the various courts of appeals. Plaintiff's counsel acknowledged at argument here today that under the "hybrid" test plaintiff would not be considered an "employee."

This court agrees that a "hybrid" test is more appropriate in the circumstances presented by this case, but the question remains as to the precise version of the "hybrid test" to be applied under ERISA.

Although there appears to be no rule precisely on point in this circuit, our Court of Appeals has previously relied upon Supreme Court precedent to supplement the traditional common law test for determining whether a person is an "employee" under other federal legislation and has also underscored what it considers to be the remedial purposes of ERISA. In Avis Rent A Car System, Inc. v. United States, 503 F.2d 423, 428-29 (2d Circuit 1974), the Court of Appeals enumerated seven factors that can be considered to determine whether a person is an "employee" or an "independent contractor":

1. Control of the manner in which the service is performed.
2. The presence or absence of a substantial investment in tools or equipment.
3. Whether the person performing a service undertakes a substantial cost, such as hiring his own laborers.
4. If a person may increase his profit by exercising managerial skill.
5. If the service rendered requires special skill.

6. Whether the relationship between the person rendering the service and the person receiving the service is permanent.
7. Whether the person works in the course of the other person's business rather than in an ancillary capacity.

See also Cohen v. Martin's, 537 F. Supp. 766, 773 (S.D.N.Y. 1982) (considering five factors under ERISA: (1) degree of control and supervision; (2) the existence and nature of remuneration; (3) the permanency of the relationship; (4) whether the services were rendered in the normal course of business; and (5) conduct on the part of the parties evidencing an employment relationship.)

Although it is possible to employ even a greater number of factors and subfactors, see for example Garrett v. Phillips Mills, Inc., 721 F.2d 979, 982 (4th Circuit 1983), this court concludes that the Avis factors, considered in conjunction with ERISA's remedial purposes, provide an appropriate and ample standard for the determination of employee status under ERISA.

In evaluating ERISA's remedial purposes, the Darden court emphasized Congress's intent that the important reliance interests in retirement benefits of employees who lacked bargaining power be protected from the harmful effects of mismanaged or underfunded pension plans. While this characterization of ERISA is accurate, our Court of Appeals has taken what, in the context of the present case, may be considered a narrower view. Reviewing the history of ERISA, our Court of Appeals has noted that Title I was designed to protect workers in "traditional employer-employee relationships," who rely upon collective bargaining agreements to protect their pension benefits. Schwartz v. Gordon, 761 F.2d 864, 868 (2d Circuit 1985). Such vulnerable employees are to be given the protection of ERISA's pension provisions, while presumably more sophisticated self-employed individuals have available other means of protecting their retirement income. Id.

Given the strictures of Schwartz v. Gordon, it appears appropriate first to apply the seven Avis factors to decide whether Mr. Harlow more closely resembles a "traditional employee" or a "self-employed individual" and then to reevaluate this conclusion in light of ERISA's remedial purposes to determine whether he should be considered an "employee" for ERISA purposes.

Turning first to control of the manner in which the service is performed: Nationwide places some restrictions upon how their agents do business, but it is clear from the record that Mr. Harlow controlled much, if not all, of the manner in which he conducted his business. On balance, this factor favors a finding of independent contractor status.

Mr. Harlow had also made a substantial investment in the business, so the second factor also favors a finding of independent contractor status.

Mr. Harlow also hired his own employees, so the third factor also favors a finding that he was an independent contractor.

The fourth factor, whether a person may increase his profit by exercising managerial skill; clearly favors a finding of independent contractor status.

The fifth factor, the requirement of a special skill, also tends toward a finding of independent contractor status.

The sixth factor, the permanency of the relationship, is somewhat ambiguous. The relationship here was temporary in form, with periodical renewals, but indefinite (if not permanent) in practice, as Mr. Harlow's history with Nationwide and that of his father before him reveals.

Finally, Mr. Harlow worked in the ordinary course of Nationwide's business, so this factor favors a finding of employee status.

In sum, an examination of these factors without any direct reference to ERISA leads to the conclusion that Mr. Harlow should be considered an independent contractor rather than an employee.

A consideration of these facts in light of ERISA's remedial purposes does not change this conclusion. While Nationwide appears to possess superior bargaining power, Mr. Harlow does not appear to be in the class of vulnerable individuals that our Court of Appeals has indicated are the particular object of Congressional solicitude in ERISA. Mr. Harlow did not rely on others to protect his interests, but, rather, personally entered into an arrangement which explicitly defined his status as that of an independent contractor. While this sort of declaration of legal status in a contract is not binding on this court, the consistency of this particular declaration with the conclusion drawn from an examination of the seven Avis factors reaffirms that Mr. Harlow should not be surprised to find himself treated as a self-employed individual both by Nationwide and by the law. In other words, neither the economic reality of his situation nor the characteristics of his relationship with Nationwide support the contention that Mr. Harlow was an "employee" for ERISA purposes.

Accordingly, Nationwide's motion to dismiss Mr. Harlow's ERISA claim in Count Two of his amended complaint is granted, while plaintiff's motion for summary judgment as to the ERISA count is denied.

However, the finding that Mr. Harlow is not an employee for ERISA purposes does not end the inquiry as to the remaining claims in Count Two of plaintiff's complaint. Plaintiff also argues that the noncompetition provisions of his agreement with Nationwide are void as against public policy under Connecticut law. Nationwide argues that because plaintiff has continued to abide by these provisions and to accept his deferred compensation, he lacks standing to challenge the validity of these provisions. Nationwide also argues that the noncompetition clauses are valid under Connecticut law.

Plaintiff does have standing to seek a declaratory judgment. Plaintiff has neither received all the funds due him under his agreement with Nationwide, nor is it entirely

clear that he will not be liable for the return of those funds were he to violate the provisions of the agreement at any time during his life.

Plaintiff's claim that the agreement violates public policy presents issues for resolution that are sharp and clear; no additional clarity is to be gained by waiting for an actual violation before addressing these issues. "Where a real, substantial, and existing controversy between the parties to a contract exists, a party may not be compelled to breach the contract in order to determine the consequence of the breach, and a declaratory judgment is a proper vehicle for relief." Fine v. Property Damage Appraisers, Inc., 393 F. Supp. 1304, 1310-11 (E.D. Louisiana 1975) (citations omitted). Where a promisor seeks to have a covenant declared illegal as violative of public policy, a declaratory judgment action is available. Beit v. Beit, 135 Conn. 195, 201, 63 A.2d 161, 164 (1948).

In order to be valid under Connecticut law, a restraint on competition must be reasonable. To be reasonable "the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interest of the party in whose favor it is to operate, without unduly interfering with the public interest." Eldia, Inc. v. Harmor Realty Corporation, 177 Conn. 218, 226, 413 A.2d 1226, 1230 (1979) (citations omitted); compare Scott v. General Iron & Welding Co., 171 Conn. 132, 137, 368 A.2d 111, 114 (1976) (stating that such a restriction must be partial and restricted in its operation in respect "*either to time or place*" (emphasis added)).

Furthermore, even if a contract restraining competition is found to be valid, provisions providing for a penalty for the violation of the restraint, rather than for liquidated damages, will not be enforced. "The designation of a sum as liquidated damages does not necessarily make it such rather than a penalty. If the provision was inserted for the purpose of deterring the defendant from breaching his contract and of penalizing him for doing so,

instead of specifying a sum which the parties in good faith agreed upon as representing the damages which would ensue from a breach, it is to be regarded as imposing a penalty." May v. Young, 125 Conn. 1, 8-9, 2 A.2d 385, 388-89 (1938). See also Lipinski v. Columbus Plaza, Inc., 4 Conn. Cir. 24, 225 A.2d 36, 40 (Conn. Cir. Ct. Appellate Division 1966) ("Forfeitures are not favored. Where the contract provides for a penalty for nonperformance, as distinguished from liquidated damages fixing fair compensation to the injured party for the breach, it will not be enforced.").

As is indicated in the record, insurance policies are generally written for a period of one year. In the present case, the agreement forbids the plaintiff from engaging in the insurance business at all for one year within a twenty-five mile radius of his former agency. This restriction, limited both in time and space, reasonably serves the objective of protecting Nationwide's interests in its present customers. However, the second noncompetition provision of the agreement absolutely forbids Mr. Harlow from soliciting any of his Nationwide customers without any limitation whatsoever as to duration. While this provision does not absolutely prohibit Mr. Harlow from soliciting people who are not Nationwide policyholders, it contains no limit whatsoever as to time and goes beyond what is necessary to protect the company's interest in its business.

Accordingly, the provision absolutely prohibiting the solicitation of Nationwide's customers without any time limit violates public policy under Connecticut law, and is therefore void.

The question remains whether the void provision is severable or may be reformed. Plaintiff contends that it cannot, relying on Beit v. Beit, supra, 135 Conn. 195, 63 A.2d 161 (1948). However, plaintiff reads Beit v. Beit too broadly, and the rule appears to require an inquiry into the intent of the parties. Id., 135 Conn. at 204, 63 A.2d at 165. In the instant case, where there are two

distinct covenants, one reasonable, and one not, there is no impediment to divisibility. Id.

Accordingly, the provision barring Mr. Harlow from the insurance business for one year within twenty-five miles of his old agency may be enforced. At the same time, however, there is no basis by which the court can discern the parties' intent as to the proper durational limit to the prohibition against soliciting former Nationwide employees. Accordingly, under the rule of Beit v. Beit, this court cannot reform this provision and must therefore strike it in its entirety.

Since it has been more than one year since Mr. Harlow's agency has been terminated, and Mr. Harlow has not violated either of the restrictive covenants in his agreement with Nationwide, the court need not decide whether the forfeiture provision for the violation of the restriction the court has found reasonable is unenforceable as a penalty.

Plaintiff's motion for summary judgment is granted in part, and denied in part. The provision absolutely barring him from soliciting Nationwide's customers is void and unenforceable, and cannot be reformed. Nationwide shall continue to pay Mr. Harlow his deferred compensation as required in their agreement.

In sum, defendants' motion to dismiss plaintiff's ERISA claim in Count Two is granted. Plaintiff's motion for summary judgment as to the claim in Count Two that the noncompetition provisions of the agreement are void as violative of Connecticut public policy is granted in part and denied in part.

Inasmuch as the rulings here today have disposed of all counts of the complaint, judgment shall enter in accordance with this ruling.

It is so ordered.

MS. FREEMAN: Thank you, your Honor.

MR. ECKENRODE: Thank you, your Honor.

* * * *